# The Austrian Banking Act

**and**

# The Austrian Financial Market Authority Act

Translations by

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# Table of Contents


Introduction to the Fifth Edition . . . . . 1
Introduction to the Fourth Edition . . . . . 2
Introduction to the Third Edition . . . . . 3
Introduction to the Second Edition . . . . . 4
Introduction to the First Edition . . . . . 6

**Part I: The Austrian Banking Act**

**Chapter I**

**General Provisions**

§ 1 Credit Institutions and Financial Institutions . . . . . 13
§ 2 Definitions . . . . . 15
§ 3 Exceptions . . . . . 24

**Chapter II**

**License**

§§ 4, 5 Granting of the License . . . . . 26
§ 6 Revocation of the License . . . . . 29
§ 7 Expiration of the License . . . . . 30
§ 8 Relationship to Third Countries . . . . . 30

**Chapter III**

**Freedom of Establishment and Freedom to Provide Services**

§ 9 Member State Credit Institutions in Austria . . . . . 32
§ 9a Member State Investment Firms in Austria . . . . . 33
§ 10 Austrian Credit Institutions in Member States . . . . . 33
§ 11 Member State Financial Institutions in Austria . . . . . 34
§ 12 Austrian Financial Institutions in Member States *(repealed)*
§ 13 Subsidiaries of Member State Financial Institutions in Austria . . . 36
§ 14 Subsidiaries of Austrian Financial Institutions in Member States *(repealed)*
§§ 15–18 Supervision in the Context of Freedom of Establishment and Freedom to Provide Services . . . . . 38
§ 19 Service of Documents . . . . . 40

**Chapter IV**

**Ownership Provisions and Permits**

§ 20 Qualifying Participations in Credit Institutions . . . . . 40
§ 21 Permits . . . . . 42

**Chapter V**

**Regulatory Provisions**

§ 22 Solvency . . . . . 43
§ 22a Valuation of Positions of the Trading Book . . . . . 52
§ 22b Own Funds Requirement for the Trading Book . . . . . 52

| | | |
|---|---|---|
| § 22 c | Consolidation of the Trading Book | 53 |
| § 22 d | Netting of Position Risks and Currency Conversion | 54 |
| § 22 e | Treatment of Composite Instruments and Options | 55 |
| § 22 f | Specific and General Position Risk | 56 |
| § 22 g | Specific Position Risk in Debt Instruments and Monies Issued in the Money Market | 56 |
| § 22 h | General Position Risk in Interest Based Instruments | 56 |
| § 22 i | Specific and General Position Risk in Equities | 60 |
| § 22 j | Position Risk in Stock-Index Futures | 60 |
| § 22 k | Underwritings | 61 |
| § 22 l | Settlement Risk | 61 |
| § 22 m | Free Deliveries | 62 |
| § 22 n | Repurchase Agreements, Securities and Commodities Lending | 63 |
| § 22 o | Over-The-Counter Derivative Instruments and other Positions in Connection With Trading in Financial Instruments | 63 |
| § 22 p | Commodities Risk | 64 |
| § 23 | Own Funds | 66 |
| § 24 | Consolidated Own Funds | 72 |
| § 25 | Liquidity | 75 |
| § 26 | Open Foreign Exchange Positions and Gold | 80 |
| § 26 a | Open Term Positions | 82 |
| § 26 b | Internal Models For the Limitation of Market Risks | 83 |
| § 27 | Large Exposures | 85 |
| § 28 | Transactions with Affiliated Parties | 91 |
| § 29 | Participations | 92 |

**Chapter VI**
**Group of Credit Institutions**

| | | |
|---|---|---|
| § 30 | Group of Credit Institutions | 93 |

**Chapter VII**
**Savings Deposits**

| | | |
|---|---|---|
| § 31 | Savings Documents | 96 |
| § 32 | Deposits to and Payments out of Savings Deposits and Interest | 97 |

**Chapter VIII**
**Provisions Regarding Consumers**

| | | |
|---|---|---|
| § 33 | Consumer Credit Agreements | 98 |
| § 34 | Consumer Current Account Agreements | 101 |
| § 35 | Price Display and Advertising | 102 |
| § 36 | Business Relationships With Juveniles | 102 |
| § 37 | Valuation | 103 |

**Chapter IX**
**Banking Secrecy**

| | | |
|---|---|---|
| § 38 | Banking Secrecy | 103 |

**Chapter X**
**Duty of Diligence and Money Laundering**

| | | |
|---|---|---|
| § 39 | Duty of Diligence | 104 |
| §§ 40, 41 | Money Laundering | 105 |

## Chapter XI
## Internal Audit


| | | |
|---|---|---|
| § 42 | Internal Audit | 108 |


## Chapter XII
## Accounting


| | | |
|---|---|---|
| §§ 43, 44 | General Provisions | 110 |
| §§ 45 – 50 | General Provisions on Drawing up the Balance Sheet | 111 |
| § 51 | Provisions Relating to Certain Balance Sheet Items | 113 |
| §§ 52 – 54 | Special Provisions Relating to Certain Items of the Profit and Loss Account | 115 |
| §§ 55 – 58 | Valuation Rules | 117 |
| §§ 59, 59 a | Consolidated Financial Statement | 118 |
| §§ 60 – 63 | Bank Auditors | 119 |
| § 64 | Notes on the Accounts | 125 |
| § 65 | Publication | 127 |


## Chapter XIII
## Provisions Concerning the Cover Fund Pursuant to § 230 a Civil Code


| | | |
|---|---|---|
| §§ 66 – 68 | Provisions Concerning the Cover Fund Pursuant to § 230 a Civil Code | 128 |


## Chapter XIV
## Supervision


| | | |
|---|---|---|
| §§ 69 –72 | Supervision | 129 |
| § 73 | Reporting Requirements | 135 |
| § 74 | Notifications | 137 |
| § 75 | Reporting of Major Loans | 138 |
| § 76 | State Commissioner | 139 |
| §§ 77, 77 a | International Cooperation and Data Processing | 141 |


## Chapter XV
## Moratorium and International Sanctions


| | | |
|---|---|---|
| § 78 | Moratorium and International Sanctions | 144 |


## Chapter XVI
## The Oesterreichische Nationalbank


| | | |
|---|---|---|
| §§ 79 – 81 | The Oesterreichische Nationalbank | 146 |


## Chapter XVII
## Insolvency Provisions


| | | |
|---|---|---|
| §§ 82 – 91 | Insolvency Provisions | 147 |


## Chapter XVIII
## Structural Provisions


| | | |
|---|---|---|
| § 92 | Transfer of Assets into Stock Corporations | 150 |

**Chapter XIX**
**Deposit Guarantee**

§§ 93 – 93 c Deposit Guarantee and Investor Compensation . . . . . 152

**Chapter XX**
**Protection of Designations**

§ 94 Protection of Designations . . . . . 162

**Chapter XXI**
**Savings Associations and Employee Savings Banks**

§ 95 Savings Associations and Employee Savings Banks . . . . . 163

**Chapter XXII**
**Procedural and Punitive Provisions**

§§ 96 –101 Procedural and Punitive Provisions . . . . . 164

**Chapter XXIII**
**Transformation and Redemption of Participation Capital**

§ 102 Transformation of Participation Capital . . . . . 169
§ 102 a Redemption of Participation Capital . . . . . 170

**Chapter XXIV**
**Transitional and Final Provisions**

§§ 103 – 103 d Transitional Provisions . . . . . 171
§ 104 Change of Designations . . . . . 182
§ 105 References and Regulations . . . . . 183
§ 106 Repeals . . . . . 183
§§ 107, 108 Entry into Force and Implementation. . . . . 184

**Annexes** . . . . . 189
Annex 1 to § 22 . . . . . 189
Annex 2 to § 22 . . . . . 190
Annex 3 to § 22 . . . . . 191
Annex 1 to § 43, part 1 . . . . . 191
Annex 2 to § 43, part 1 . . . . . 213
Annex 2 to § 43, part 2 . . . . . 215
Annex to § 73, para 6. . . . . 216

**Regulations Implementing the Banking Act** . . . . . 218

**Part II: The Austrian Financial Market Authority Act**

§§ 1, 2 Financial Market Authority . . . . . 221
§ 3 *Repealed* . . . . . 222
§ 4 Organs . . . . . 222
§§ 5 – 7 Management Board. . . . . 222
§§ 8 – 12 Supervisory Board . . . . . 224
§ 13 Financial Market Committee. . . . . 226
§ 14 Personnel . . . . . 227
§ 15 Transition of Personnel of the Federal Ministry of Finance . . . . . 228

| | | |
|---|---|---|
| § 16 | Supervision of the FMA by the Federal Minister of Finance | 229 |
| § 17 | Financial Plan | 230 |
| § 18 | Annual Financial Statements. | 231 |
| §§ 19, 20 | Costs of Supervision | 231 |
| § 21 | Administrative Assistance | 233 |
| § 22 | Procedural Provisions | 234 |
| § 23 | Calling on the Supreme Administrative Court | 234 |
| § 24 | Exemption from Fees and Duties | 235 |
| §§ 25, 26 | Transitional Provisions | 235 |
| § 27 | References | 237 |
| §§ 28, 29 | Entry into Force and Enforcement | 237 |

**Index** . . . . . 239

## Introduction to the Fifth Edition

The present volume contains in its Part I the text of the Austrian Banking Act of 1993 as most recently amended by federal legislation, namely Art II of the Financial Market Authority Act – FMABG, effective as of July 1, 2001, respectively August 1, 2001, respectively January 1, 2002, respectively April 1, 2002, as well as the E-Money Act, effective as of April 2, 2002. Part II contains the Text of the FMABG.

The FMABG has changed the structure of the existing system of banking supervision in Austria. Existing capacities in the Federal Ministry of Finance and in the Oesterreichische Nationalbank have been combined in a new independent agency, the Financial Market Authority (FMA). A multitude of revised provisions in the Banking Act take account of this fact and of the changed cooperation between Federal Minister of Finance, Oesterreichische Nationalbank and FMA. Substantial changes to the Banking Act include the tightening of the prerequisites for obtaining a banking license and the strengthening of the qualifications of bank auditors (introduction of a system of rotation of auditors, requirement of continuing audit education, increase in liability insurance and extension of audit duties).

The E-Money Act implements the provisions of Directive 2000/46/EC on the taking up, pursuit of and prudential supervision of the business of electronic money institutions into Austrian law.

Vienna, April 2002 *Christian Hausmaninger*

## Introduction to the Fourth Edition

The present volume contains the text of the Austrian Banking Act of 1993 as most recently amended by federal legislation, namely, Art 8 of the first Euro Finance Facilitating Act BGBl I No 126/1998, effective as of August 1, 1998 or January 1, 1999, respectively, Art III of the Criminal Law Amending Act 1998 BGBl I No 153/1998, effective as of October 1, 1998, Art II of the Act on Group Accounts BGBl I No 49/1999, effective as of March 27, 1999, Art I of BGBl I No 63/1999, effective as of January 1, 1999 or May 1, 1999, respectively, and Art VII of BGBl I No 123/1999, effective as of July 1, 1999.

Art 8 of the First Euro Finance Facilitating Act contains changes of certain provisions of the Banking Act in view of the introduction of a common European Currency, the euro. Provisions affected in particular in this context are those concerning liquidity and stocks without nominal value. Other changes aim at preventing uncertainty, e. g., concerning deposit guarantee, or result from practical experience in the application of the Banking Act. New provisions allow for broader international cooperation of banking supervision authorities pursuant to new EU agreements concluded under Art 8 of Directive 92/30/EEC.

Art III of the Criminal Law Amending Act 1998 tightens the money laundering definition of § 40 Banking Act in view of reformulated money laundering provisions in the Criminal Code (§§ 165 and 278 a). It also sets out more clearly the restrictions on use and notification of data concerning financial misdemeanors in order to improve the protection of customers' reliance.

Art II of the Act on Group Accounts introduces special provisions for credit institutions that elect to draw up their group accounts according to International Accounting Standards (IAS) or Generally Accepted Accounting Principles (US-GAAP).

The latest amendments introduced by BGBl I No 63/1999 and BGBl I No 123/1999 implement Directive 97/9/EC on investor compensation schemes and allow credit institutions to call in participation capital for redemption on a compulsory basis.

Vienna, August 1999 *Christian Hausmaninger*

## Introduction to the Third Edition

The present volume contains the text of the Austrian Banking Act of 1993 as most recently amended by federal statutes BGBl Nos 742/1996, 753/1996 ("second major amendment to the Banking Act"), 757/1996, and BGBl I Nos 58/1997, 63/1997, and 114/1997 ("Insolvency Law Amendment Act 1997").

The second major amendment to the Banking Act implements the following European law provisions (proposals) into Austrian law:

1. 393 L 0006: Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions, OJ No L 141/1 of 11. 6. 1996, p. 1 ("Capital Adequacy Directive");
2. 393 L 0022: Council Directive 93/222/EEC of 10 May 1993 on investment services in the securities field, OJ No L 141 of 11. 6. 1993, p. 27 ("Investment Services Directive");
3. 395 L 0026: European Parliament and Council Directive 95/26/EEC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision, OJ No L 168 of 18. 7. 1995, p. 7 ("Post-BCCI-Directive");
4. 396 L 0010: Directive 96/10/EC of the European Parliament and of the Council of 21 March 1996 amending Directive 89/647/EEC as regards recognition of contractual netting by the competent authorities, OJ No L 85 of 3. 4. 1996, p. 17 ("Contractual Netting-Directive"); and
5. DG XV/1023/95: Draft proposal for a European Parliament and Council Directive amending Article 12 of Directive 77/780/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, Articles 2, 6, 7, 8 and Annexes II and III of Directive 89/647/EEC on a solvency ratio for credit institutions and Article 2 and Annex II of Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions.

Art X of the Insolvency Law Amending Act 1997 introduces the "zero hour rule" into Austrian insolvency law in general and into the insolvency proceedings of banks in particular. The amendments introduced by the other federal statutes referred to above are of a technical nature.

Vienna, November 1997 *Christian Hausmaninger*

## From the Introduction to the Second Edition

The present volume contains the text of the Austrian Banking Act of 1993 as most recently amended by federal statutes BGBl 1996/304 (Article X of the federal statute implementing EU-company law Directives, in force as of July 1, 1996), BGBl 1996/445 ("first major amendment to the Banking Act", in force as of August 1, 1996, January 1, 1997 and July 1, 1997, respectively) and BGBl 1996/446 ("amendment on anonymous accounts", in force as of August 1, 1996 and October 1, 1996, respectively).

Article X of the federal statute implementing EU-company law makes adaptations to the accounting provisions of §§ 43 and 63 Banking Act that have become necessary because of the harmonization of accounting provisions of the Austrian Commercial Code with EU company law Directives.

The "first major amendment to the Austrian Banking Act" implements into Austrian law the EU banking legislation adopted after the Agreement on the European Economic Area (EEA) entered into force. In addition, it avails itself of the opportunity to reflect practical experience gained in the application of the Act since its enactment in 1993. The following Directives are being implemented:

1. 389 L 0117: Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents (OJ No L 44 of 16 February 1989, p. 40);
2. 392 L 0030: Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis (OJ No L 110 of 28 April 1992, p. 52);
3. 392 L 0121: Council Directive 92/121/EEC of 21 December 1992 on the monitoring and control of large exposures of credit institutions (OJ No L 29 of 5 February 1993, p. 1); and
4. 394 L 0019: Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ No L 135 of 31 May 1994, p. 5).

Approximately 100 amendments and additions were made to almost all Chapters of the Banking Act. Important and in some instances far-reaching amendments affect in particular the Chapters on regulatory provisions (with special emphasis on the provisions on large exposures), groups of credit institutions, consumer provisions, duty of care and money laundering, accounting, supervision, insolvency and deposit guarantee.

The "amendment on anonymous accounts" intends to put an end to national and international criticism of the possibility of bank customers to keep anonymous securities deposits in Austria, thereby being capable of impeding enforcement of prohibitions against insider crime and money laundering.

From now on only savings books will be exempt from the general duty to disclose one's identity when entering into an ongoing business relationship with a credit institution. Transactions pursuant to § 12 Deposits Act and the acquisition or receipt of securities in existing anonymous depository accounts (not, however, a sale out of these deposits) is subject to the identification duty. No duty of customer identification shall apply according to the *travaux prépara-toires* in the case of merely technical measures of deposit administration such as in particular the renewal of coupon sheets, the exchange of securities certificates as a result of capital measures, the collection of coupons and redemption proceeds, etc.

With the enactment of the aforementioned amendments to the Banking Act, the Austrian legislator has accomplished an important task. But a next round of amendments to the Banking Act is already pending: for 1997 five additional European law provisions have been scheduled for implementation into Austrian law.

Vienna, October 1996 *Christian Hausmaninger*

## Introduction to the First Edition*)

The present legislative proposal is a new version of the Credit System Act *(Kreditwesengesetz),* BGBl No 63/1979 as amended by federal statutes BGBl Nos 370/1982, 325/1986, 415/1988, 281/1990, 475/1990 and 18/1992. It contains the main provisions on banking supervision.

The amendments to the Credit System Act effected by federal statute BGBl No 325/1986 were already far reaching and represented first steps in the approximation of Austrian banking law to European standards.

Because of Austria's membership in the European Economic Area (EEA), however, an even more extensive adaptation has become necessary, affecting virtually all provisions of the Credit System Act that concern banking supervision. This aspect not only excluded the possibility of change by (further) amendment and required an entirely new statute, but also suggested a new title of this statute *("Bankwesengesetz"),* which would reflect this fact.

Pursuant to the EEA Agreement and the *acquis communautaire* agreed upon for this area of the law, respectively, the present legislative proposal for a Banking Act incorporates the provisions of eleven EC Directives into Austrian law and, in addition, takes account of five**) EC Recommendations. The most important of these Directives are the two banking Directives, the Directive on own funds of credit institutions, the Directive on a solvency ratio for credit institutions, the Directive on annual accounts and consolidated accounts, and the Directive on the supervision of credit institutions (banks) on a consolidated basis. An exhaustive enumeration of the Directives and Recommendations shall follow below.

The drafting of the new Banking Act also presented an opportunity to make autonomous improvements, for instance concerning the proper provisions on banking supervision: not only have they been rendered more flexible; they also provide for an increased cooperation with the Oesterreichische Nationalbank.

The main changes of this legislative proposal vis-à-vis the Credit System Act currently in force – for a detailed analysis the special section of the *travaux préparatoires* should be consulted – are the following:

In accordance with the terminology used by the EC (German versions of the Directives), the main **addressees of banking legislation** are now called **credit institutions** (instead of "banks"). The catalogue of banking activities has been slightly enlarged vis-à-vis the one contained in the Credit System Act, but has substantially remained the same.

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*) This introduction is an English translation of the general section of the *travaux préparatoires* to the new Austrian Banking Act *(Bankwesengesetz)* published in the Stenographic Minutes of the National Council, GP XVIII RV 1130.

**) Appendix b) below lists only four Recommendations.

**Financial institutions** conduct – without being credit institutions – one or more of the activities to which the reciprocal recognition pursuant to the second banking Directive applies; for the purpose of this Banking Act they are of importance insofar as some of its provisions are applicable to them and that they must be included into the consolidation of a superordinate credit institution.

The **licensing provisions** no longer contain the requirement of a local need test for the intended banking activity; in contrast, however, the role of the **owner(s)** and their guaranteeing an orderly management of the banking business has been emphasized.

EEA Member State credit institutions may conduct banking business in Austria without an Austrian license by way of the **freedom of establishment** or the **freedom to provide services.** The supervisory authority at their respective corporate seat is competent for supervision, while Austrian authorities are competent to supervise compliance with provisions that lie in the public interest, for instance the provisions on consumer credits.

The most substantial changes have occurred in the area of **prudential and regulatory provisions** (or standards):

- The provisions on own funds have been revised as to composition and capital to be taken into account. Own funds must attain **a solvency ratio** of 8% of the weighted assets and of the off-balance sheet transactions. The weighting is performed according to the risk involved, the Federation, OECD Member States, (Austrian) States and (Austrian) municipalities having been assigned a weighting of 0%. This solvency ratio shall also be applied in case of a consolidated treatment of groups of credit institutions.
- **Own funds** consist of core capital and supplementary own resources. In accordance with the EC minimum standard, the ratio of these categories shall be 4 : 4. The legislative proposal allows for revaluation reserves in a limited manner, but (similar to the Credit System Act) it does not allow for a liability sum surcharge.
- The **provisions on liquidity** have been revised insofar as starting with January 1, 1997 they shall be complied with on the basis of residual maturities; the reporting of residual maturities will already start from January 1, 1996.
- The limitation of **open** (foreign currency) **positions** and of **major investments** remains unchanged in principle, the increased basis of own funds was, however, taken into account by reducing the limitation percentages for major investments.
- The previous limitation of permanent investments was replaced by a **limitation of holdings in companies that are neither credit institutions, nor financial institutions, nor insurance companies.**

As concerns **provisions on consumers,** the pertinent EC law has been implemented to the extent it concerns credit institutions; any falling below standards already attained in Austria was, however, avoided.

The exceptions from **banking secrecy** remained substantially the same, except for the addition of the reporting duty in case of suspicion of money laundering within the meaning of the EC Directive on money laundering.

The **provisions on accounting** had already to a large extent been adapted to EC-standards by the Accounting Act of 1990 and the simultaneously enacted amendments to the Credit System Act. They have now been further adapted to the provisions of the Directive on the Supervision of Credit Institutions on a Consolidated Basis (83/350/EEC). In order to avoid a second change within a very short period of time (consolidation according to the provisions of the Accounting Act and now according to the new Banking Act), the final change will take effect as of January 1, 1995.

Finally, the cooperation between the Federal Minister of Finance and the Oesterreichische Nationalbank in the area of **banking supervision** has been considerably broadened. The periodical on site audits of credit institutions envisaged by this Act, whereby the bank supervision authorities will receive considerably earlier and more specific information on banking activities and individual credit institutions, should be pointed out as a particularly remarkable change in this context. In addition, the means of supervision and the sanctions have been refined and designed to be substantially more flexible: thus, in case of breaches of the law, the revocation of the license has become a measure of last resort; also, a number of new administrative offenses have been created.

Upon entry into force of the new Banking Act, the following legal provisions shall be repealed:
- the Credit System Act;
- Articles II and III of federal statute BGBl No 325/1986, amending the Credit System Act;
- the Bank Agents Act;
- the Central Monetary Institutions Act and the Receivership Act, the provisions of which have been, for the most part, incorporated into the insolvency provisions of the new Banking Act;
- parts of the Federal Act on the Reorganization of Pupils' Law, whose substantive provisions have been incorporated into the new Banking Act;
- the Reconstruction Act;
- the Federal Act on the Sale of Stock of Nationalized Banks; as well as
- all implementing regulations to the Credit System Act, to the Reconstruction Act and to Article XVII Federal Act on the Reorganization of Pupils' Law.

Pursuant to the EEA Agreement, the following Directives and Recommendations are part of the *acquis communautaire* and must thus be implemented or taken into account:

**a) Directives**

1. 373 L 0183: Council Directive 73/183/EEC of 28 June 1973 on the abolishment of restrictions on the freedom of establishment and the freedom to provide services for independent activities of credit institutions and other financial institutions (OJ No L 194, 16. 7. 1973, p. 1, as corrected by OJ No L 320, 21. 11. 1973, p. 26 and OJ No L 17, 22. 1. 1974, p. 22);
2. 377 L 0780: First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions

relating to the taking up and pursuit of the business of credit institutions (OJ No L 322, 17. 12. 1977, p. 30), as amended by:
- 386 L 0524: Council Directive 86/524/EEC of 27 October 1986 amending Directive 77/780/EEC in respect of the list of permanent exclusions of certain credit institutions (OJ No L 309, 4. 11. 1986, p. 15); and
- 389 L 0646: Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ No L 386, 30. 12. 1989, p. 1);

3. 389 L 0646: Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ No L 386, 30. 12. 1989, p. 1);
4. 389 L 0299: Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions (OJ No L 124, 5. 5. 1989, p. 16);
5. 389 L 0647: Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions (OJ No L 386, 30. 12. 1989, p. 14);
6. 391 L 0031: Commission Directive 91/31/EEC of 19 December 1990 adapting the technical definition of "multilateral development banks" in Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions (OJ No L 17, 23. 1. 1991, p. 20);
7. 383 L 0350: Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis (OJ No L 193, 18. 7. 1983, p. 18);
8. 386 L 0635: Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ No L 372, 31. 12. 1986, p. 1);
9. 389 L 0117: Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents (OJ No L 44, 16. 2. 1989, p. 40);
10. 391 L 0308: Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ No L 166, 28. 6. 1991, p. 77); and
11. 387 L 0102: Council Directive 87/102/EEC of December 22, 1986 on harmonization of legal and administrative provisions of member countries on consumer credit (OJ No L 42 of 12. 2. 1987), as amended by:
    - 390 L 0088: Council Directive 90/88/EEC of 22 February 1990 (OJ No L 61 of 10. 3. 1990);

**b) Recommendations**

1. 387 X 0062: Commission Recommendation 87/62/EEC of 22 December 1986 on monitoring and controlling large exposures of credit institutions (OJ No L 33 of 4. 2. 1987);

2. 387 X 0063: Commission Recommendation 87/63/EEC of 22 December 1986 concerning the introduction of deposit-guarantee schemes in the Community (OJ No L 33 of 4. 2. 1987);
3. 390 X 0109: Commission Recommendation 90/109/EEC of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions (OJ No L 67 of 15. 3. 1990); and
4. 388 X 0590: Commission Recommendation 88/590/EEC of 17 November 1988 concerning payment systems, and in particular the relationship between cardholder and card issuer (OJ No L 317 of 24. 11. 1988).

With the exception of the legal norms referred to under points a) 11 and b) 4, all Directives and Recommendations relevant to the EEA are listed in Annex IX of the EEA Agreement.

The Directive on consumer credits referred to in point a) 11 could be implemented in the Banking Act only to the extent that credit institutions are concerned; the application of the Directive to insurance companies is ensured by an amendment to the Supervision of Insurance Companies Act.

The legal basis for legislation of the Federation in this area of the law is provided by Art 10 para 1 No 5 of the Austrian Constitution.

# Part I
# The Austrian Banking Act

# The Austrian Banking Act

**dated July 30, 1993, Federal Law Gazette (BGBl) No 532/1993, in force as of January 1, 1994, as amended by promulgations BGBl Nos 639/1993, 917/1993, 50/1995 and BGBl I No 58/1997, and federal statutes BGBl Nos 505/1994, 22/1995, 383/1995, 304/1996, 445/1996, 446/1996, 742/1996, 753/1996, 757/1996, and BGBl I Nos 63/1997, 114/1997, 11/1998, 126/1998, 153/1998, 49/1999, 63/1999, 123/1999, 25/2000, 33/2000, 135/2000, 2/2001, 97/2001 and 45/2002**

## Chapter I
## General Provisions

### Credit Institutions and Financial Institutions

**§ 1.** (1) A credit institution is an institution authorized to transact banking activities pursuant to § 4 or § 103 No 5 of this federal statute or pursuant to special federal statutory provisions. The following activities, if conducted on a commercial basis, are banking activities:

1. the acceptance of moneys of others for administration or as deposit (deposit business);
2. the carrying out of non-cash payment transactions and clearing of checking accounts for others (checking account business);
3. the entering into money loan contracts and extension of money loans (credit business);
4. the purchase of checks and bills of exchange, in particular the discounting of bills of exchange (discount business);
5. the custody and administration of securities for the account of others (custody business);
6. the issuance and administration of means of payment such as credit cards and travelers checks;
7. the dealing for own or other than own account in
   a) foreign means of payment (foreign exchange and foreign currency business);
   b) money market instruments;
   c) financial futures contracts, including equivalent cash-settled instruments and options to acquire or dispose of any instruments falling within lit a and d through f, including equivalent cash-settled instruments (futures and options business);
   d) forward interest rate agreements and interest rate adjustment agreements (FRAs), interest rate and currency swaps as well as equity swaps;
   e) transferable securities (securities business);

f) instruments derived from lit b through e,
unless such dealing is done in favor of private assets.

8. the assumption of sureties, guarantees and other liabilities for others, insofar as the performance assumed is to be rendered in money (guarantee business);
9. the issuing of mortgage bonds, municipal bonds and funded bank bonds and the investment of their proceeds in accordance with the applicable legal provisions (issuing of securities business);
10. the issuing of other fixed income securities in order to invest the proceeds in other banking activities (other issuing of securities business);
11. participation in the underwriting of third party issues of any of the instruments listed in No 7 lit b through f and the provision of services related thereto (third party issuing of securities business);
12. the acceptance of housing construction savings deposits and the granting of housing construction loans pursuant to the Housing Construction Savings and Loan Associations Act (housing construction savings and loan business);
13. the administration of capital investment funds pursuant to the Investment Funds Act – InvFG 1993, BGBl No 532/1993 Art II (investment business);
14. the establishment or administration of participation funds pursuant to the Participation Funds Act, BGBl No 111/1982 (participation fund business);
15. the financing business through acquisition and resale of shares (capital financing business);
16. the purchase of accounts receivable arising from delivery of goods or rendering of services, assumption of the risk of collection on such claims – excepting credit insurance – and, in connection therewith, the collection of such claims (factoring business);
17. money brokering in the interbank market; and
18. the brokerage of transactions set forth in
    a) No 1, unless conducted by contractual insurance companies;
    b) No 3 with the exception of the brokerage of mortgage loans and personnel loans by licensed real estate agents, personnel loan and mortgage loan brokers, and investment advisers;
    c) No 7 lit a, insofar as it concerns the foreign exchange business; and
    d) No 8;
19. the providing of the following services relating to financial instruments, to the extent these services do not encompass the holding of money, securities or other instruments so that the provider of these services at no time places himself in debit with his clients (financial services business):
    a) investment advice concerning client funds;
    b) managing client portfolios in accordance with mandates given by investors; and
    c) brokerage of business opportunities for the acquisition or sale of one or more of the instruments referred to in No 7 lit b through f;
20. the issuing of electronic money (e-money business).

(2) A financial institution is an institution that is not a credit institution within the meaning of para 1 and which is authorized to perform on a commercial basis one or more of the following activities, insofar as they are conducted as main activities:

1. the entering into leasing contracts (leasing business);
2. the over-the-counter purchase of foreign means of payment (e.g., currency, checks, travelers' letters of credit and payment orders) and over-the-counter sale of foreign currencies and of traveler checks (exchange bureau business);
3. advice to companies on capital structure, industrial strategy and related questions as well as advice and services relating to mergers and acquisitions of companies;
4. *(Repealed by federal statute BGBl No 753/1996);*
5. credit reference services; and
6. safe custody services.

(3) Credit institutions are also allowed to perform the activities mentioned in para 1 No 19 and in para 2 and all other activities which directly relate to the banking activity pursuant to the respective extent of the license or are ancillary to the banking activity, such as in particular the brokerage of housing construction savings and loan contracts, of insurance contracts, of companies and businesses, of shares held in investment funds, of equity shares, the performance of services in the area of automated data processing and the sale of credit cards. They are furthermore entitled to trade within the limits of the legal provisions concerning foreign exchange in coins and medals and in gold bars, as well as to rent out safe deposit boxes with joint custody of the owner.

(4) The Federal Minister of Finance may, by regulation, amend or supplement the list of activities set forth in paras 1 and 2 if this should be necessary because of sufficiently precise obligations of the Republic of Austria arising from its accession to the European Union. If the list of activities set forth in para 2 is to be amended or supplemented, the Federal Minister of Finance shall issue the regulation with the consent of the Federal Minister for Economic Affairs.

(5) In legal disputes arising from banking activities, the defense that the claim is based on a speculation for differences qualified as game or bet may not be relied upon if at least one party to the contract is authorized to carry on such activities on a commercial basis.

### Definitions

**§ 2.** For the purpose of this federal statute

1. "managers" shall mean
   a) those physical persons who, pursuant to statute or articles of association, are authorized to conduct the business of and legally represent a credit institution or financial institution;

b) as concerns credit cooperatives, those physical persons who have been entrusted by the managing board, the supervisory board or the general assembly with the management and have also been named as managers; only the managers shall be entitled to represent a credit cooperative – irrespective of an existing *"Prokura"* (full power of commercial representation within the meaning of § 48 Commercial Code) or *"Handlungsvollmacht"* (commercial power of attorney as set forth in § 54 Commercial Code); the appointment as manager shall be entered into the commercial register;

c) with respect to branch offices of foreign credit or financial institutions, those physical persons who are authorized to conduct the business and legally represent the branch office;

2. "participation" shall mean the ownership, direct or indirect, of 20% or more of the voting rights or capital of another company; it is irrelevant whether or not the shares are held in the form of securities; if less than 20% of the voting rights or the capital in another company are held, a participation exists if the shares are designed to serve one's own business through a permanent link to this company; personally liable partners in a partnership of commercial law are deemed to always hold a participation in the partnership;
3. "qualifying participation" shall mean the ownership, direct or indirect, of 10% or more of the capital or of the voting rights of a company, or the possibility to exercise a significant influence on the management of a company in which a participation is held. § 92 of the Stock Exchange Act 1989 shall apply in determining the voting rights within the meaning of § 4 para 3 No 5, § 5 para 1 No 3, § 20 and § 21 para 1 No 2;
4. "articles of association" shall mean, depending on the legal form of the company, the articles of association, the charter, or the cooperative charter;
5. "Member State" shall mean:
   a) any state that is a member of the European Economic Area;
   b) contrary to lit a, the term Member State in § 8 para 6 refers to any state that is a member of the European Economic Area without at the same time being a member of the European Union;
6. "home Member State" shall mean:
   a) in the case of credit institutions: the Member State in which the credit institution within the meaning of the first indent of Art 1 of Directive 77/780/EEC is admitted and in which it has its seat;
   b) in the case of investment firms:
      aa) if they are natural persons, the Member State in which their head office is situated;
      bb) if they are legal persons, the Member State in which their registered office is situated or, if under their national law they have no registered office, the Member State in which their head office is situated;
   c) in the case of markets: the Member State in which the registered office of the body which provides trading facilities is situated or, if un-

der its national law it has no registered office, the Member State in which that body's head office is situated;

7. "host Member State" shall mean the Member State in which
   a) a credit institution; or
   b) a credit institution within the meaning of Art 1 first indent of Directive 77/780/EEC, or an investment firm within the meaning of Art 1 No 2 of Directive 93/22/EEC, which has been authorized in another Member State,

   operates a branch office or provides services;
8. "third country" shall mean a state that is not a member of the European Economic Area;
9. "competent authorities" shall mean those authorities in the Member States which pursuant to legal or administrative regulations are competent for the supervision of credit institutions or investment firms;
10. "initial capital" shall mean capital within the meaning of § 23 para 1 Nos 1 and 2, less a balance sheet loss and material negative results in the ongoing business year;
11. "parent company" shall mean a parent company within the meaning of § 244 paras 1 and 2 Commercial Code subject to the following provisions:
    a) the legal form and the corporate seat are not to be considered;
    b) the provisions of § 244 paras 4 and 5 Commercial Code are applicable;
    c) the "participation" definition of § 2 No 2 Banking Act is applicable;
12. "subsidiary" shall mean a subsidiary company within the meaning of § 244 paras 1 and 2 Commercial Code subject to the following provisions:
    a) the legal form and corporate seat are not to be considered;
    b) the provisions of § 244 paras 4 and 5 Commercial Code are applicable;
    c) the "participation" definition of § 2 No 2 Banking Act is applicable.
13. "foreign credit institution" shall mean whoever outside the Member States is authorized according to the legal provisions of the state of incorporation to do business within the meaning of § 1 para 1;
14. "foreign financial institution" shall mean whoever outside the Member States is authorized according to the legal provisions of the state of incorporation to do business within the meaning of § 1 para 2;
15. "authorization" shall mean an act of state of whatever form, which permits the exercise of the activities of a credit institution within the meaning of Art 1 first indent of Directive 77/780/EEC;
16. "branch office" shall mean a place of business which forms a legally dependent part of a credit institution, a financial institution or an investment firm and which carries out directly all or some of the transactions inherent in the business of the respective credit institution, financial institution or investment firm; any number of places of business set up in the same Member State by a credit institution, a financial institution or an investment firm with headquarters in another Member State shall be regarded as a single branch office;
17. "representation" shall mean a place of business forming a legally dependent part of a credit institution not authorized in Austria which does not conduct business within the meaning of § 1 para 1;

18. "Zone A" shall comprise all Member States and all other full Member States of the Organization for Economic Cooperation and Development (OECD), as well as those countries which have concluded special loan arrangements with the International Monetary Fund (IMF) under the Fund's General Arrangements to Borrow (GAB); any country which reschedules or has applied for a rescheduling of its external sovereign debt is precluded from Zone A for a period of 5 years starting with the application of the last rescheduling agreement; in those cases where rescheduling has been applied for, the application date shall be relevant;
19. "Zone B" shall comprise all states not in Zone A;
20. "Zone A credit institutions" shall mean:
    a) all Austrian credit institutions;
    b) all credit institutions authorized in a Member State, if the Directives for credit institutions are fully applicable to them, including their branch offices in third countries; and
    c) all companies whose activity consists in receiving deposits or other refundable moneys from the general public and extending loans for their own account and that are authorized in other Zone A countries, including their branch offices;
21. "Zone B credit institutions" shall mean all companies authorized in Zone B whose activity consists in receiving deposits or other refundable moneys from the general public and in extending loans for own account, including their branch offices within the Member States;
22. "non-bank" shall mean whoever is not a credit institution within the meaning of Nos 20 or 21;
23. in deviation from § 1 para 1, the term "credit institution" shall refer to all credit institutions within the meaning of Nos 20 and 21 in the following sections:
    a) in Nos 9, 16, 17, 25 and 26;
    b) in § 21 para 1 No 1, if at least one of the credit institutions involved is a credit institution within the meaning of § 1 para 1;
    c) in § 21 para 1 No 2, if the credit institution holding or acquiring the voting rights or the capital is a credit institution within the meaning of § 1 para 1;
    d) in § 23 para 13 for those credit institutions in which a participation is held;
    e) in § 24 para 1, para 3 Nos 2 and 3 as well as para 4;
    f) in § 25 paras 4, 8 and 10 No 5 first half sentence;
    g) in § 27 para 8 Nos 2 and 4;
    h) in § 30 with respect to the subordinated credit institutions;
    i) in §§ 51 through 54;
    j) in § 59;
    k) in § 77a para 2 Nos 2 and 3;
    l) in § 93 para 5; and
    m) in Annexes 1 and 2 to § 43;
24. in deviation from § 1 para 2, the term "financial institution" shall, in the following provisions, additionally comprise all those financial institutions

within the meaning of Art 1 No 6 of Directive 89/646/EEC that have their corporate seat outside Austria:
a) in No 25;
b) in § 23 para 13 for those financial institutions in which a participation is held;
c) in § 24 para 1, para 3 Nos 2 and 3 and para 4, and
d) in § 30 with respect to the subordinated financial institutions;
e) in § 77 a para 2 Nos 2 and 3; and
f) in § 93 para 5 No 1;

25. "financial holding company" shall mean a legal person or a company,
a) which is not a credit institution;
b) whose main activity consists in acquiring or holding participations or to conduct one or more of the activities set forth in Nos 2 through 12 of the Annex to Directive 89/646/EEC;
c) the subsidiary companies of which (§ 30) are either exclusively or mainly credit institutions, investment firms or financial institutions; determinative in this assessment shall not be the number of subsidiary companies, but economic criteria, in particular balance sheet sum, amount of own capital and book value of the participation; and
d) the subsidiary companies of which include at least one credit institution or one investment firm;

26. "mixed-activity company" shall mean a legal person or a company (meaning any legal person) other than a credit institution, an investment firm or a financial holding company, the subsidiaries of which include at least one credit institution or one investment firm;

27. "ancillary banking services company" shall mean a company
a) the activity of which is a direct extension of the banking activity, or
b) the principal activity of which consists in managing real estate, managing or operating data-processing centers, or similar activities, provided that such activities are ancillary to the principal activity of one or more credit institutions;

28. "close links" shall mean a situation in which two or more natural or legal persons are linked by:
a) the direct ownership of a participation,
b) the existence of a relationship between a parent company and a subsidiary; any subsidiary of a subsidiary shall also be considered a subsidiary of the parent company which is at the head of those companies, or
c) a relationship between natural or legal persons of the kind that each of them is closely linked to one and the same person pursuant to No 2;

29. "investment service" shall mean any of the services listed in Section A of the Annex to Directive 93/22/EEC relating to any of the instruments listed in section B of the Annex to that Directive that are provided for a third party;

30. "investment firm" shall mean
a) an investment service company pursuant to § 19 Securities Supervision Act, BGBl No 753/1996;

b) a recognized investment firm;
c) a company with corporate seat abroad that is not a recognized investment firm and that conducts activities within the meaning of § 1 para 1 No 7 lit b through f, No 11 or No 19;

31. "recognized investment firm" shall mean
a) a company established in a Member State, that conducts business within the meaning of § 1 para 1 No 7 lit b through f or No 11 that is subject to the provisions of Directive 93/22/EEC;
b) a company established in a third country which
aa) conducts business within the meaning of § 1 para 1 No 7 lit b through f or No 11;
bb) is authorized in a third country represented in the Basle Committee for Banking Supervision; and
cc) has to comply with prudential rules that are at least as stringent as the minimum standard of the European Union for investment firms;

A company which exclusively takes on orders by investors and forwards them without holding money or securities of its clients and for this reason at no time may be a debtor of these clients, is not a recognized investment firm;

32. "recognized exchange" shall mean a securities exchange within the meaning of § 1 para 2 Stock Exchange Act 1989, BGBl No 555/1989 that is regulated and supervised by a state authority or a state-recognized authority, takes place regularly and is accessible to the public directly or indirectly through a clearing member;

33. "recognized clearing house" shall mean a facility that
a) is regulated and supervised by a state authority or a state-recognized authority,
b) is accessible to members directly and to non-members through a clearing member,
c) executes transactions in financial services and enters into all transactions routed through it as counterparty, and
d) requires from its settlement partners the payment of adequate margins for risk coverage;

34. "financial instruments" shall mean
a) money market instruments;
b) special off-balance sheet financial transactions within the meaning of Nos 1 through 4 of Annex 2 to § 22; all options sold shall also be taken into account;
c) *(Repealed by federal statute BGBl I No 2000/33);*
d) securities;
e) shares in foreign investment funds pursuant to § 24 para 1 Investment Funds Act 1993, to the extent they are not securities;

35. "trading book" shall mean
a) proprietary positions of a credit institution in financial instruments, commodities or commodity derivatives which it holds for resale or which it has taken on with the intention of benefiting short term from

actual or expected differences between their buying and selling prices, or from fluctuations in prices or interest rates;

b) positions in financial instruments, commodities or commodity derivatives arising from matched principal broking;

c) underwritings for securities (§ 22 k);

d) claims arising from unsettled transactions (§ 22 l) and from free deliveries (§ 22 m) in connection with transactions included in the trading book;

e) repurchase agreements, reverse repurchase agreements, securities and commodities borrowing and securities and commodities lending transactions of the trading book;

f) other positions, in connection with the trade in financial instruments, as in particular exposures in the form of fees, commissions, interest, dividends and margins on exchange-traded futures and options contracts;

g) assets and transactions in order to secure or refinance positions in the trading book;

items shall be included in the trading book in accordance with objective internal procedures fixed by the institution; securities held in the trading portfolio must in any case be included in the trading book; the inclusion or exclusion of positions in or from the trading book must be documented in the records of the credit institution in a reasoned manner which may be duplicated by third party experts;

36. "over-the-counter (OTC) derivative instruments" shall mean special off-balance-sheet financial transactions referred to in Nos 1 through 4 of Annex 2 to § 22 and written options on the financial transactions listed in Nos 1 through 4 of this Annex, that are not traded on recognized exchanges where they are subject to daily margin requirements or routed through a recognized clearing house;

37. "regulated market" shall mean a market for financial instruments included in the list of regulated markets pursuant to Art 16 of Directive 92/22/EEC;

38. "qualifying items" shall mean:

a) long and short positions in the non-subordinated assets referred to in § 22 para 3 No 2; in the case of derivative financial instruments the respective basis instrument shall be relevant;

b) long and short positions in non-subordinated debt instruments if

aa) the debt instruments are not to be weighted pursuant to § 22 para 3 Nos 1 and 2;

bb) they are admitted to trading on a recognized securities exchange;

cc) the market in the debt instruments is considered by the credit institution to be sufficiently liquid; and

dd) the credit institution estimates the credit standing of the issuer to be established without doubt;

long and short positions in asset items pursuant to lit a and in debt instruments pursuant to lit b which present a special risk because of lacking

credit standing of the issuer or because of lacking liquidity of the issue, are not considered qualifying items;

39. "central government items" shall mean long and short positions in debt instruments, to the extent they may be provided pursuant to § 22 para 3 No 1 with a weighting of zero;

40. "debt instruments" shall mean securities evidencing claims and financial instruments derived therefrom;

41. "equities" shall mean stock, participating receipts and other securities with equity participation as well as financial instruments derived therefrom; stock indices are formed of equities;

42. "warrant" shall mean a security which gives its holder the right to purchase or sell a number of debt instruments or equities at a stipulated price until the warrant's expiry date, it being irrelevant whether the transaction is settled by the delivery of the securities themselves or their equivalent;

43. "inventory financing" shall mean positions where commodities were sold forward and the financing costs were fixed until the date of the forward sale;

44. "repurchase agreement of the trading book" shall mean a transaction within the meaning of § 50 para 1 concerning securities or commodities included in the trading book in which it is contractually forbidden to transfer or pledge a particular security or commodity to more than one counter-party at one time; for the existence of a repurchase agreement of the trading book it is irrelevant whether the commitment to repurchase occurs at a specified price or at a price to be specified in the future; an agreement whereby a credit institution transfers a guaranteed legal claim to securities or commodities is also deemed a repurchase agreement if such guarantee is issued by a recognized securities exchange that holds the rights to the securities or commodities;

45. "securities or commodities lending of the trading book" shall mean a transaction in securities or commodities included in the trading book, in which the credit institution transfers securities or commodities to a third party subject to a commitment by the borrower to return equivalent securities or commodities at some future date or when requested to do so by the transferor;

46. "reverse repurchase agreement of the trading book" shall mean a repurchase agreement of the trading book from the perspective of the company acquiring the securities, the commodities or the claims, provided that of the conditions mentioned hereinafter either the conditions in lit a, b, c and e, or the conditions in lit d and e are fulfilled:
    a) the risk positions are computed daily at market price according to the provisions of § 22n para 1;
    b) the collateral is adjusted in order to take account of substantial changes in value of the securities or commodities subject to the repurchase agreement;

c) the transaction or agreement provides that the credit institution's claims are automatically and directly offset against the claims of the counter-party, if the latter does not meet its obligations;
d) the transaction or agreement concerned is an interprofessional transaction;
e) these transactions or agreements have been entered into subject to recognized and appropriate procedures;

47. "securities borrowing transaction of the trading book" shall mean a securities lending transaction from the perspective of the institution acquiring the securities, the commodities or the claims, provided that either the conditions listed in No 46 lit a, b, c and e or in No 46 lit d and e are fulfilled;
48. "clearing member" shall mean a member of a recognized exchange or a recognized clearing house which has a direct contractual relationship with the central counter-party (owner of the facility) with the proviso, that non-clearing members of the exchange or the clearing house are obligated to have their trades routed through a clearing member;
49. "delta" shall mean the factor indicating the expected change in an option price as a proportion of a small change in the price of the instrument underlying the option, referring in each case to monetary units;
50. "long position in debt instruments" shall mean a position in which a credit institution has fixed the interest rate it will receive at some time in the future;
51. "short position in debt instruments" shall mean a position in which the credit institution has fixed the interest rate it will pay at some time in the future;
52. the following companies shall be deemed companies of the financial sector:
    a) credit institutions, investment firms and insurance companies supervised pursuant to European Union Directives;
    b) Zone A credit institutions;
    c) recognized investment firms;
    d) recognized clearing houses; and
    e) recognized exchanges;
53. "interest based financial instruments" shall mean financial instruments whose market value or present value (cash value) depends on market interest rates;
54. "gamma risk" shall mean the sensitivity of the delta vis-à-vis the changes in the price of the underlying instrument;
55. "vega risk" shall mean the sensitivity of the option price vis-à-vis fluctuations in the volatility of the underlying instrument;
56. "scenario-matrix method" shall mean the calculation of the option risks by revaluing option risks under different scenarios;
57. "credit risk" shall mean the exposure consisting in the danger of a partly or complete failure of contractually agreed payments; § 51 para 14 remains unaffected.

58. "electronic money" (e-money) shall mean monetary value stored on an electronic data device, issued on receipt of "small" monetary funds and accepted as means of payment by companies other than the issuer. The e-monetary value stored on electronic data devices shall not exceed the amount of 2,000 euro per customer and e-money institution (§ 1 E-Money Act). The redemption value may not be less than the value of the e-money issued. The receipt of monetary funds does not constitute a deposit or other repayable funds according to Art 3 of Directive 2000/12/EC, or the deposit business according to § 1 para 1 No 1, if the funds received are immediately exchanged for e-money. § 1 para 1 No 6 does not apply to e-money. E-money is not a deposit; § 93 paras 2 and 2a do not apply.

**Exceptions**

**§ 3.** (1) The provisions of this federal statute shall not apply to

1. the Oesterreichische Nationalbank, notwithstanding the duties imposed on it by this federal statute;
2. *(Repealed by federal statutes BGBl No 1996/742 and BGBl I No 58/1997);*
3. the postal system concerning its money transactions;
4. territorial entities to the extent they extend loans or credits with subsidy character on the basis of authorization by federal or state legislation;
5. official brokers, to the extent that they conduct the business for which they are authorized pursuant to § 35 Stock Exchange Act;
6. companies that are development companies, do not subscribe to the public and are at least 51% owned by corporations under public law, regarding the capital financing business;
7. the Oesterreichische Kontrollbank Aktiengesellschaft with respect to legal transactions in the context of export promotion pursuant to the Export Promotion Act 1981 and the Export Financing Promotion Act 1981, regarding §§ 22 and 25 through 27; and
8. the Fund for the Promotion of Scientific Research pursuant to § 2 para 1 Research Promotion Act 1982 – FFG, BGBl No 434/1982, and the Research Promotion Fund for Industry and Trade pursuant to § 2 para 2 FFG as regards the promotion loans extended by these funds.

(2) The provisions of § 25 paras 2 through 14 shall not apply to:

1. credit institutions that have no license for the savings deposit business (§ 1 para 1 No 1) and that, pursuant to their articles of association, exclusively or predominantly conduct money market, syndication, trust or commission business, in particular for the Federation or other territorial entities, and the financing of export business;
2. credit institutions that have no license for the savings deposit business (§ 1 para 1 No 1) and that, pursuant to their articles of association, exclusively or predominantly conduct the guarantee business or the capital financing business;
3. credit institutions that have no license for the savings deposit business (§ 1 para 1 No 1) but that, pursuant to their articles of association, exclusively

or predominantly grant short or long-term loans or credits for investment purposes and do not grant current account credits;
4. credit institutions authorized to conduct the investment business or the participation fund business;
5. credit institutions already in existence whose annual balance sheet total does not exceed 73 million euro, that have no license for the savings deposit business and whose business purpose is exclusively the extension of medium and long-term credits for investment purposes and that are predominantly funded by way of issuance of bonds;
6. credit institutions that do not have a license for the savings deposit business (§ 1 para 1 No 1) and that, pursuant to their articles of association, exclusively or predominantly issue bonds whose revenue is put at the disposal of credit institutions of the same sector, if those credit institutions are jointly and severally liable;
7. credit institutions that, pursuant to their articles of association, predominantly conduct the factoring business;
8. credit institutions that exclusively issue and administer credit cards, including the extension of loans and the assumption of guarantees directly connected therewith; and to
9. credit institutions that have no license for the acceptance of deposits requiring guarantee pursuant to § 93 para 1 and that, pursuant to their articles of association, refinance themselves exclusively on schedule and only in interbanking dealings.

(3) The provisions of this federal statute shall not apply to the following companies insofar as they conduct activities referred to in § 1 para 1 that appertain to their proper business:

1. contractual insurance companies with the exception of § 31 para 2, § 33, § 38 para 4, § 39 para 3, § 41 paras 1 through 4, 6 and 7, and § 75;
2. pension funds under the Pension Funds Act;
3. companies recognized as non-profit building associations;
4. social security institutions;
5. companies engaging in the trade of pawn broking; and
6. recognized investment firms pursuant to § 2 No 31 lit b and local firms that conduct activities pursuant to Art 2 No 20 of Directive 93/6/EEC and companies having their seat in a third country pursuant to § 15 para/No 4 Stock Exchange Act with respect to activities pursuant to § 1 para 1 No 7 lit b through f, respectively, which they conduct on a commercial basis in the context of their membership with a securities exchange, to the extent they limit themselves in Austria exclusively to the conduct of activities on a commercial basis falling within the scope of their admission as exchange members. This also applies to such activities conducted by members of a cooperation exchange (§ 15 para 5 Stock Exchange Act) as well as to the activities of a recognized clearing exchange conducted in the context of settlement of exchange transactions. This exception does not apply to §§ 39 para 3, 40 and 41; the aforementioned companies are also exempted from the application of the provisions of the Trade Act as regards the aforementioned activities.

(4) § 5 para 1 No 5 shall apply to credit institutions that are authorized to conduct investment business subject to the proviso that the initial capital shall be 2.5 million euro instead of 5 million euro.

(5) Whoever

1. is authorized to conduct the financial services business (§ 1 para 1 No 19),
2. has no authorization to conduct banking activities pursuant to § 1 para 1 Nos 1 through 18, and
3. does not ground his authorization to conduct the financial services business on §§ 9 et seq,

is not a credit institution within the meaning of § 1 para 1 and is not subject to the provisions of this federal statute but to the provisions of the Securities Supervision Act, unless the Securities Supervision Act expressly provides otherwise.

(6) § 5 para 1 No 5 shall apply to credit institutions applying for a license only for the e-money business subject to the proviso that the initial capital shall be 1 million euro instead of 5 million euro. § 1 para 3, § 25 paras 2 through 14 as well as § 29 shall not apply to credit institutions authorized to conduct only the e-money business; § 8 para 1 No 1 shall not apply to authorizations restricted to conducting the e-money business.

## Chapter II
## License

### Granting of the License

**§ 4.** (1) A license from the Financial Market Authority (FMA) shall be required for the conduct of businesses listed in § 1 para 1.

(2) The license shall be granted in writing, otherwise it shall be null and void; it may be qualified by appropriate conditions and stipulations, may extend only to one or more of the businesses mentioned in § 1 para 1 and may exclude parts of specific banking activities from the scope of the license.

(3) The applicant shall enclose the following information and documentation with the application for issuance of a license:

1. corporate seat and legal form;
2. articles of association;
3. the business plan from which the type of intended business, the organizational structure of the credit institution, and the internal control procedures may be inferred; the business plan shall furthermore contain a budget calculation for the first three business years;
4. the amount of initial capital which is at the free and unlimited disposal of the managers in Austria;
5. the identity and amount of the contribution of those owners that hold a qualifying participation in the credit institution, and information on the structure of the group, if those owners are members of a group and the information necessary to determine the reliability of these owners, the legal representatives and the possibly personally liable partners of these owners; and

6. the names of the designated managers and their qualification to operate the business.

(4) The application of a foreign credit institution (§ 2 No 13) for the granting of a license to operate a domestic branch office shall, in addition to the information required under para 3 Nos 1, 2, 3, 5, and 6, include the following information and documentation:

1. the three latest annual financial statements of the company;
2. the businesses pursuant to § 1 para 1 conducted by the foreign company, as well as the locations at which they are conducted;
3. the amount of initial endowment in euro which is at the free and unlimited disposal of the managers in Austria;
4. the decision-making authority of the branch office management as well as the authorities of the head office whose consent must be obtained for specific internal decisions; and
5. a written declaration by the supervisory authority at the seat of the head office of the company, stating that it has no objections to the establishment of a branch office of the company in Austria.

(5) Prior to the granting of a license to a credit institution, the FMA shall inform the competent authorities of another Member State of the application, if

1. the application pursuant to para 3 has been filed by a subsidiary of a credit institution within the meaning of the first indent of Art 1 of Directive 77/780/EEC authorized in another Member State or by an investment firm authorized in another Member State;
2. the application pursuant to para 3 has been filed by a subsidiary which is itself a subsidiary of a credit institution within the meaning of the first indent of Art 1 of Directive 77/780/EEC authorized in another Member State or of an investment firm authorized in another Member State;
3. the credit institution is controlled by the same natural and legal persons as control a credit institution within the meaning of the first indent of Art 1 of Directive 77/780/EEC authorized in another Member State or an investment firm authorized in another Member State.

(6) Prior to the granting of a license to a credit institution, the FMA, simultaneously notifying the Federal Minister of Finance, shall hear the Oesterreichische Nationalbank. If the application for issuance of the license includes the request for authorization to take deposits requiring a guarantee (§ 93 para 2) or to carry out investment services requiring cover (§ 93 para 2 a), the FMA shall, prior to granting the license, also hear the deposit guarantee facilities.

(7) The FMA may in individual cases, by way of publication in the Official Gazette attached to the *Wiener Zeitung* or in any other printed publication medium with Austria-wide distribution, inform the public of the fact that a specifically named company is not authorized to conduct certain banking activities. If requested by individuals, the FMA shall within reasonable time provide information on the scope of the license of credit institutions. The

FMA shall until January 1, 2004 build a data base containing information on the actual scope of the existing credit institutions' licenses and provide access to these data on the internet.

**§ 5.** (1) The license shall be granted if:

1. it is intended that the company shall be established in the legal form of a stock corporation, a cooperative, or a savings bank;
2. the articles of association contain no provisions that fail to guarantee the safety of the assets entrusted to the credit institution and the orderly conduct of the businesses pursuant to § 1 para 1;
3. the persons that hold qualifying participations in the credit institution satisfy the requirements imposed in the interest of sound and prudent management of the credit institution and no facts exist that may raise doubts as to the personal reliability of these persons; if such facts exist, the license shall be granted only if the doubts prove to be unfounded;
4. the effective exercise of the FMA's supervisory function is not impeded by close links of the credit institution with other natural or legal persons;

4a. the laws, regulations and administrative provisions of a third country governing a natural or legal person with which the credit institution has close links, or difficulties involved in enforcing these provisions do not impede the FMA in the effective exercise of its supervisory function;

5. the initial capital or the initial endowment is not less than 5 million euro and is at the free and unlimited disposal of the managers in Austria;
6. no manager is disqualified because of a reason listed in § 13 paras 1 to 6 of the 1994 Trade Act);*)
7. no manager has been charged with committing an intentional criminal act punishable by a prison term exceeding one year, starting with the legally binding indictment or the bringing of the criminal charges and ending with the final verdict that terminates the criminal proceedings;
8. the managers possess the professional qualification, the qualities and the experience required for the management of the credit institution, their personal finances are in order and no facts exist that may raise doubts as to the personal reliability of the managers; if such facts exist, the license shall be granted only if the doubts prove to be unfounded; the professional qualification of a manager presupposes adequate theoretical and practical knowledge in the businesses applied for pursuant to § 1 para 1 as well as management experience; professional qualification to manage a credit institution shall be presumed if at least three years of experience in an executive position in a company of comparable size and type of business are demonstrated;
9. no exclusionary grounds within the meaning of Nos 6, 7, 8 or 13 exist against a non-Austrian manager that would prevent his acting as manager of a credit institution in the state of which he is a national; this must be confirmed by the supervisory authority of the home Member State; if, however, such confirmation cannot be obtained, the manager in question

*) Repromulgated as 1994 Trade Act in BGBl No 194/1994.

shall have to demonstrate that such confirmation cannot be obtained, to show the absence of the above-mentioned exclusionary grounds and to issue a statement as to the existence of the above-mentioned exclusionary grounds;
10. Austria is for at least one manager the center of his activities;
11. at least one manager has command of the German language;
12. the credit institution has at least two managers and the articles of association prohibit individual power of representation or individual *Prokura* (full power of commercial representation within the meaning of § 48 Commercial Code) or individual commercial power of attorney for the entire business operation and, as concerns credit cooperatives, the management of the business is limited to the managers;
13. no manager has another full-time occupation outside the field of banking or insurance companies or pension funds; and
14. the registered office and the head office are located in Austria.

(2) A credit institution and every designation protected according to § 94 may only be entered as firm name or business purpose into the commercial register if the respective final legal rulings are presented either in the original or in certified copy (photocopy). The rulings need not be presented if the conduct of banking business is permitted pursuant to § 9, § 11, § 13 or § 103 No 5. The competent court shall serve orders and resolutions concerning such entries into the commercial register also on the FMA and on the Oesterreichische Nationalbank. The FMA shall communicate to the competent court any information received pursuant to § 9 paras 2 and 5, § 11 para 3 and § 13 para 3.

(3) In the case of licensing a branch office of a foreign credit institution in Austria, the FMA shall transmit a copy of the ruling to the supervisory authority at the seat of the head office.

(4) A license pursuant to § 1 para 1 No 20 may not be issued to an applicant who already holds another license under § 1 para 1. This shall not apply if the applicant already holds a license pursuant to § 1 para 1 Nos 1 and 3 or is granted a license under § 1 para 1 Nos 1 and 3 simultaneously with the license under § 1 para 1 No 20.

### Revocation of the License

**§ 6.** (1) The FMA may revoke the license if

1. the business operation for which it has been granted is not commenced within twelve months from the granting of the license, or
2. the business operation for which it has been granted has not been conducted for a period of more than six months.

(2) The FMA shall revoke the license if

1. it was granted on the basis of incorrect statements or deceptive conduct or was otherwise fraudulently obtained;
2. the credit institution does not fulfill its obligations to its creditors; or
3. the conditions of § 70 para 4 No 3 are met.

(3) Apart from paras 1 and 2, the FMA shall revoke the license of a branch office of a foreign credit institution if the license of the head office has been revoked.

(4) A ruling revoking the license shall have the same legal effect as a corporate resolution dissolving the credit institution, unless within three months after the ruling has become final the businesses pursuant to § 1 para 1 are abandoned as purpose of the enterprise and the commercial name is changed in accordance with § 94. The FMA shall serve a copy of this ruling to the Registry Court, and in the case of branch offices of foreign credit institutions also to their competent authority; the ruling revoking the license shall be entered into the commercial register.

(5) The Registry Court shall, upon petition by the FMA, appoint liquidators if persons otherwise called upon to liquidate do not guarantee an orderly liquidation. If the FMA is of the opinion that the persons called upon for the purpose of liquidation do not guarantee an orderly liquidation, its shall request the appointment of qualified liquidators by the competent court for commercial matters at the corporate seat of the credit institution; the court decides in a non-contentious proceeding.

### Expiration of the License

**§ 7.** (1) The license shall expire:

1. at the end of its term;
2. if a condition subsequent is met (§ 4 para 2);
3. upon voluntary relinquishment;
4. upon completion of the liquidation of the credit institution;
5. upon institution of bankruptcy proceedings over the assets of the credit institution; and
6. upon entry of the merger or de-merger of credit institutions into the commercial register of the transferring credit institution(s) and upon entry of a transfer pursuant to § 92 into the commercial register with respect to double or multiple licenses of a credit institution.

(2) The expiration of the license shall be declared by a ruling of the FMA. Paras 4 and 5 of § 6 shall apply by analogy.

(3) The voluntary relinquishment of a license (para 1 No 3) shall be valid only if submitted in writing and only if all banking activities have been previously terminated.

### Relationship to Third Countries

**§ 8.** (1) The FMA shall communicate to the European Commission:

1. every granting of a license pursuant to § 4; if a license is issued to a direct or indirect subsidiary of one or more companies that are foreign credit institutions, the organizational structure of the group shall also be communicated;
2. every acquisition by a foreign credit institution of a participation in a credit institution authorized in Austria through which this credit institution becomes a subsidiary of that foreign credit institution;

3. difficulties encountered by an Austrian credit institution in establishing itself or conducting banking activities in a third country; and
4. every revocation of a license pursuant to § 6.

(2) If the European Commission passes a resolution within the meaning of Art 9 para 4 second subparagraph of Directive 89/646/EEC or within the meaning of Art 7 para 5 subpara 2 of Directive 93/22/EEC, the FMA shall by way of ruling stay for a period of no longer than three months following the resolution of the European Commission his decision on

1. applications for the issuance of a license to conduct banking activities within the meaning of § 4 filed at the time of the resolution or at a later date and
2. reports pursuant to § 20 on the proposed acquisition of a participation of direct or indirect parent companies subject to the laws of the third country, filed at the time of the resolution.

The term pursuant to § 73 para 1 Code of Administrative Procedure is tolled by such a ruling.

(3) If the Council of the European Union passes a decision within the meaning of Art 9 para 4 third subparagraph of Directive 89/646/EEC or within the meaning of Art 7 para 5 subpara 3 of Directive 93/22/EEC, the FMA shall order by way of ruling the continuation of the stay pursuant to para 2, if applicable for the duration of the term provided for in the Council's resolution.

(4) The measures set forth in paras 2 and 3 do not apply to:

1. the establishment of subsidiaries by credit institutions duly authorized in the territory of a Member within the meaning of the first indent of Art 1 of Directive 77/780/EEC or by investment firms duly authorized in a Member State within the meaning of Art 1 No 2 of Directive 93/22/EEC at the time of the decision pursuant to para 2 or 3,
2. subsidiaries of credit institutions and investment firms within the meaning of No 1, and
3. the acquisition of participations in a credit institution duly authorized in a Member State within the meaning of the first indent of Art 1 of Directive 77/780/EEC by such credit institutions and their subsidiaries as well as in an investment firm duly authorized in a Member State within the meaning of Art 1 No 2 of Directive 93/22/EEC by such an investment firm and its subsidiaries.

(5) If the European Commission reaches a finding within the meaning of Art 9 para 3 or 4 of Directive 89/646/EEC or within the meaning of Art 7 para 5 subparas 2 and 3 of Directive 99/22/EEC, the FMA shall, upon the former's request, communicate to the European Commission:

1. every application for licensing of a direct or indirect subsidiary having at least one parent company subject to the laws of the third country concerned;
2. every intent notified pursuant to § 20 of the acquisition of a participation
   a) in a credit institution duly authorized in a Member State within the meaning of the first indent of Art 1 of Directive 77/780/EEC by a par-

ent company pursuant to No 1 by means of which the credit institution would become its subsidiary and

b) in an investment firm duly authorized in a Member State within the meaning of Art 1 No 2 of Directive 93/22/EEC by a parent company pursuant to No 1 by means of which the investment firm would become its subsidiary.

(6) Authorizations granted by the competent authority of a Member State contrary to a resolution of the European Commission or of the Council of the European Union within the meaning of paras 2 and 3, do not permit the exercise of the freedom to provide services and of the freedom of establishment pursuant to §§ 9, 11 and 13.

## Chapter III
## Freedom of Establishment and Freedom to Provide Services

### Member State Credit Institutions in Austria

**§ 9.** (1) Any credit institution authorized in a Member State within the meaning of Art 1 No 1 subpara 1 of Directive 2000/12/EC that has its corporate seat in the Member State concerned may conduct the activities referred to in Nos 1 through 14 of Annex I to Directive 2000/12/EC in accordance with paras 2 through 8 in Austria either by the establishment of a branch office or by way of the freedom to provide services, to the extent that its license authorizes it to do so. The first sentence shall not apply to e-money institutions within the meaning of Art 1 No 1 subpara 1 lit b of Directive 2000/12/EC for which a waiver has been granted pursuant to Art 8 of Directive 2000/46/EC. The first sentence shall apply to e-money institutions that are not credit institutions within the meaning of Art 1 No 1 subpara 1 lit a of Directive 2000/12/EC with the proviso that an activity in Austria does not cover the activities set forth in § 1 para 2 of the E-Money Act.

(2) The establishment of a branch office in Austria shall be permitted once the competent authority of the home Member State has transmitted to the FMA all information on the credit institution referred to in § 10 para 2 Nos 2 through 4 and para 4.

(3) After transmission of the information referred to in para 2, the FMA may within two months from the date of receipt of the information communicate to the credit institution referred to in para 1:

1. which of the notifications referred to in § 74 concerning the activities to be conducted in Austria he requires on account of his interest in a functioning banking system in Austria; and
2. the provisions of the Banking Act the credit institution needs to fulfill pursuant to para 7.

(4) Upon receipt of the communication referred to in para 3, but no later than within two months, the credit institution referred to in para 1 may establish the branch office and commence its business activities.

(5) The credit institution referred to in para 1 shall notify the FMA in writing of any change in the particulars communicated pursuant to § 10 para 2

Nos 2 through 4 and para 4 No 2 at least one month before making the change. The FMA may react thereto pursuant to para 3 Nos 1 or 2.

(6) Any credit institution wishing to exercise the freedom to provide services by conducting its activities in Austria for the first time is required to obtain a notification on the part of the competent authority of the home Member State to the FMA, stating which of the activities referred to in Nos 1 through 14 of the Annex to Directive 89/646/EEC are to be conducted.

(7) Credit institutions referred to in para 1 that conduct activities in Austria through a branch office shall comply with §§ 25, 31 through 41, 44 paras 3 though 6, 60 through 63, 65 para 3a, 66 through 68, 74, 75, 93 paras 8 and 8a, 94 and 95 paras 3 and 4 as well as, depending on their business purpose, §§ 10 through 18 Securities Supervision Act and the other federal statutes referred to in § 69 and the regulations and rulings issued on the basis of the aforementioned provisions.

(8) Credit institutions referred to in para 1 that exercise the freedom to provide services by conducting activities within Austria shall comply with §§ 31 through 41, 66 through 68, 75, 93 paras 8 and 8a, 94 and 95 paras 3 and 4 as well as, depending on their business purpose, §§ 10 through 18 Securities Supervision Act and the other federal statutes referred to in § 69 and the regulations and rulings issued on the basis of the aforementioned provisions.

### Member State Investment Firms in Austria

**§ 9a.** (1) Investment services within the meaning of Art 1 No 1 of Directive 93/22/EEC and the other services listed in Section C of the Annex to Directive 93/22/EEC may be provided in Austria pursuant to § 9 paras 2 through 6 either by the establishment of a branch or under the freedom to provide services by any investment firm authorized in a Member State that has its seat in that particular Member State provided that such services are covered by its authorization.

(2) To the extent investment firms become active pursuant to para 1, § 15 shall apply.

(3) Investment firms that conduct activities in Austria by the establishment of a branch, shall comply with §§ 33 through 41, § 44 paras 5a and 6, § 74, § 93 para 8a and § 94, with §§ 10 through 18 Securities Supervision Act as well as with the regulations and rulings issued under these provisions.

(4) Investment firms that conduct activities in Austria under the freedom to provide services shall comply with §§ 33 through 41, 93 para 8a and § 94 of this federal statute, with §§ 10 through 18 Securities Supervision Act as well as with the regulations and rulings issued under these provisions.

### Austrian Credit Institutions in Member States

**§ 10.** (1) A credit institution may conduct its activities in the Member States either by establishing a branch office or by way of the freedom to provide services, insofar as such activities are authorized by its license.

(2) Every credit institution wishing to establish a branch office on the territory of another Member State shall notify the FMA thereof. The notification shall include the following information:

1. the Member State on whose territory the branch office is to be established;
2. a business plan setting out the types of businesses envisaged and the organizational structure of the branch office;
3. the address in the host Member State from which the documents of the credit institution may be obtained; and
4. the names of the persons responsible for the management of the branch office.

(3) If the FMA, in examining the proposed venture, sees no reason to doubt the adequacy of the administrative structures and financial situation of the credit institution, it shall within three months from the date of receipt of the complete information referred to in para 2 communicate that information to the competent authority of the host Member State; the FMA shall issue a respective ruling to the credit institution within the time limit mentioned above.

(4) The FMA shall furthermore communicate the following information to the competent authorities of the host Member State:

1. the amount of the credit institution's own funds and its solvency ratio, and
2. details of the guarantee scheme which is intended to ensure the protection of depositors (investors) in the branch office.

(5) The credit institution shall notify the FMA in writing of any change in the conditions of the particulars referred to in para 2 Nos 2 through 4 and para 4 No 2 at least one month before making the change. The FMA shall communicate these particulars within three months to the competent authority of the host Member State.

(6) Any credit institution wishing to exercise the freedom to provide services by conducting activities within the territory of another Member State for the first time shall notify the FMA of those activities referred to in Nos 1 through 14 of the Annex to Directive 89/646/EEC which it intends to conduct in that Member State.

(7) The FMA shall, within one month of receipt of the notification referred to in para 6, communicate such notification to the competent authority of the host Member State.

(8) The FMA shall inform the European Commission of the number and types of cases in which it has refused to communicate particulars referred to in para 3 to the competent authority of the host Member State.

### Member State Financial Institutions in Austria

**§ 11.** (1) Any financial institution within the meaning of Art 1 No 6 of Directive 89/646/EEC that has its corporate seat in a Member State may conduct the activities set forth in Nos 2 through 14 of the Annex to Directive 89/646/EEC in Austria either by the establishment of a branch office or by way of the freedom to provide services, insofar as such activities are authorized under the legal provisions of the state of incorporation and the following conditions are fulfilled:

1. the parent company is licensed as a credit institution within the meaning of Art 1 first indent of Directive 77/780/EEC in the Member State by the law of which the subsidiary is governed and has its corporate seat in the respective Member State;
2. the respective activities are actually carried out on the territory of the same Member State;
3. the parent company holds at least 90% of the voting rights attaching to shares or stock of the subsidiary;
4. the parent company must satisfy the FMA regarding the prudent management of the subsidiary and must, with the consent of the competent authorities of the home Member State, guarantee that it will jointly and severally honor the commitments entered into by the subsidiary; and
5. the subsidiary is subject to the supervision of the competent authorities of the home Member State within the meaning of Art 18 para 2 subpara 3 of Directive 89/646/EEC and is effectively included in the supervision on a consolidated basis imposed on the parent company pursuant to the provisions of Directive 92/30/EEC, in particular as concerns the calculation of the solvency ratio, the control of large exposures and the limitations regarding participations.

(2) Para 1 shall also apply if

1. the financial institution is a subsidiary of two or more parent companies that are authorized in one or more Member States as credit institutions within the meaning of Art 1 first indent of Directive 77/780/EEC and have their corporate seats in the respective Member States, and
2. the other requirements of para 1 are met.

(3) The competent authority of the home Member State shall communicate the following notifications of the competent authorities of the home Member State to the FMA:

1. compliance with the conditions set forth in para 1 or para 2;
2. the amount of own funds of the financial institution pursuant to para 1 or 2, and
3. the amount of the consolidated solvency ratio of its parent credit institution(s);
4. a business plan describing the type of business activities envisaged and the organizational structure of the branch office;
5. the address in Austria from which documents of the financial institution pursuant to para 1 or 2 may be obtained; and
6. the names of the persons responsible for the management of the branch office.

The financial institution shall notify the FMA in writing of any change in the particulars pursuant to Nos 4 through 6. The procedural provisions of § 9 para 5 shall apply.

(4) Any financial institution wishing to exercise the freedom to provide services by conducting its activities in Austria for the first time is required to obtain a notification on the part of the competent authority of the home

Member State to the FMA stating which of the activities pursuant to Nos 2 through 14 of the Annex to Directive 89/646/EEC are to be carried out.

(5) Financial institutions referred to in paras 1 and 2 that, through a branch office in Austria, conduct

1. activities within the meaning of § 1 para 1 Nos 2 through 8, 11 or 15 through 17, shall comply with §§ 33 through 41, 44 paras 3 through 6, 60 through 63, 74, 75 and 94;
2. activities within the meaning of § 1 para 2, shall comply with § 39 para 3, § 40 and § 41;
3. activities within the meaning of § 1 para 2 No 1, shall, notwithstanding No 2, also comply with § 75.

Likewise, depending on the business activity conducted, the other federal statutes referred to in § 69 and the regulations and rulings issued on the basis of the aforementioned legal provisions shall be complied with.

(6) Financial institutions referred to in para 1 that exercise the freedom to provide services in Austria by conducting

1. activities within the meaning of § 1 para 1 Nos 2 through 8, 11 or 15 through 17, shall comply with §§ 33 through 41 and 94;
2. activities within the meaning of § 1 para 2, shall comply with § 39 para 3, § 40 and § 41.
3. *(Repealed by federal statute BGBl No 445/1996.)*

Likewise, depending on the business activity conducted, the other federal statutes referred to in § 69 and the regulations and rulings issued on the basis of the aforementioned legal provisions shall be complied with.

### Austrian Financial Institutions in Member States

**§ 12.** *(Repealed by federal statute BGBl No 445/1996.)*

### Subsidiaries of Member State Financial Institutions in Austria

**§ 13.** (1) The activities set forth in Nos 2 through 14 of the Annex to Directive 89/646/EEC may be conducted in Austria either by the establishment of a branch office or by way of the freedom to provide services by a financial institution within the meaning of Art 1 No 6 of Directive 89/646/EEC that is itself a subsidiary of such financial institutions as meet the conditions set forth in § 11 para 1 Nos 1 through 5 or § 11 para 2. The financial institution active in Austria (grandchild company) must be authorized pursuant to the legal provisions of its state of incorporation to conduct these activities in that state.

(2) Further, the following conditions must be met:

1. the parent financial institution is authorized in the Member State by the law of which its subsidiary is governed to conduct its activities as financial institution pursuant to the latter's legal provisions;
2. the respective activities are actually carried out by the grandchild company on the territory of the same Member State;

3. the superordinate institution is admitted in a Member State as a credit institution within the meaning of Art 1 first indent of Directive 77/780/EEC, has its corporate seat in this Member State and holds, directly or indirectly, at least 90% of the voting rights attaching to shares or stocks in the capital of the financial institution concerned;
4. the superordinate credit institution and the financial institution that is its direct subsidiary must satisfy the FMA regarding the prudent management of the financial institution that is to operate in Austria (grandchild company) and must have, with the consent of the competent authorities of the home Member State, jointly and severally guaranteed the commitments entered into by the grandchild company; and
5. the grandchild company is effectively included in the consolidated supervision imposed on the superordinate credit institution pursuant to the provisions of Directive 92/30/EEC, in particular as concerns the calculation of the solvency ratio, the control of large exposures and limitations regarding participations.

(3) The competent authority of the home Member State shall communicate the particulars listed in § 11 paras 3 and 4 to the FMA. The financial institution shall notify the FMA in writing of any change in the particulars pursuant to § 11 para 3 Nos 4 through 6. The procedural provisions set forth in § 9 para 5 shall apply.

(4) Financial institutions referred to in para 1 that, through a branch office in Austria, conduct

1. activities within the meaning of § 1 para 1 Nos 2 through 8, 11 or 15 through 17, shall comply with §§ 33 through 41, 44 paras 3 through 6, 60 through 66, 74, 75 and 94;
2. activities within the meaning of § 1 para 2, shall comply with § 39 para 3, § 40 and § 41;
3. activities within the meaning of § 1 para 2 No 1, shall, notwithstanding No 2, also comply with § 75.

Likewise, depending on the business activity conducted, the other federal statutes referred to in § 69 and the regulations and rulings issued on the basis of the aforementioned legal provisions shall be complied with.

(5) Financial institutions referred to in para 1 that exercise the freedom to provide services in Austria by conducting

1. activities within the meaning of § 1 para 1 Nos 2 through 8, 11 or 15 through 17, shall comply with §§ 33 through 41 and 94;
2. activities within the meaning of § 1 para 2, shall comply with § 39 para 3, § 40 and § 41.
3. *(Repealed by federal statute BGBl No 445/1996.)*

Likewise, depending on the business activity conducted, the other federal statutes referred to in § 69 and the regulations and rulings issued on the basis of the aforementioned legal provisions shall be complied with.

### Subsidiaries of Austrian Financial Institutions in Member States

**§ 14.** *(Repealed by federal statute BGBl No 445/1996.)*

### Supervision in the Context of Freedom of Establishment and Freedom to Provide Services

**§ 15.** (1) If a credit institution which conducts its activities in Austria through a branch office or by way of the freedom to provide services fails to comply with the provisions of §§ 25, 31 through 41, 44 paras 3 through 6, 60 through 63, 65 para 3a, 66 through 68, 74, 75, 93 paras 8 and 8a, 94, and 95 paras 3 and 4 or with the provisions of the other federal statutes referred to in § 69 or with regulations or rulings issued on the basis of the aforementioned provisions, the FMA shall, irrespective of the application of §§ 96 through 98 and § 99 No 7, require the institution concerned to put an end to that irregular situation within three months. If the credit institution fails to take the necessary steps, the FMA shall inform the competent authorities of the home Member State.

(2) If, despite the measures taken or to be taken by the home Member State, the credit institution within the meaning of para 1 persists in violating the provisions set forth in para 1, the FMA shall, simultaneously informing the competent authorities of the home Member State and the European Commission,

1. prohibit entirely or in part the responsible branch office managers of the credit institution from conducting the business operation, and/or
2. in the case of further infringements prohibit the credit institution from initiating further business transactions in Austria.

(3) In case of imminent danger to the fulfillment of the obligations of the credit institution within the meaning of para 1 to its creditors, in particular to the safety of assets entrusted to it, the FMA may, in order to avert this danger, impose by way of ruling temporary measures pursuant to para 2 Nos 1 and 2, simultaneously informing the competent authorities of the home Member State and the European Commission. Such measures shall expire no later than 18 months after their taking effect.

(4) In the event of the revocation of authorization of the credit institution within the meaning of para 1, the FMA shall immediately prohibit the institution from initiating further transactions. Paras 4 and 5 of § 6 are applicable.

(5) The competent authorities of the home Member State may, having first informed the FMA, conduct at the branch office either by themselves or through intermediaries authorized by them the verifications within the meaning of Art 7 para 1 of Directive 77/780/EEC as amended by Art 14 para 1 of Directive 89/646/EEC that are deemed necessary for the monitoring of the branch office in the context of bank supervision. Upon request of the competent authorities the FMA may also itself conduct such verifications according to one of the methods referred to in § 70 para 1 Nos 1 through 3.

**§ 16.** (1) If an Austrian credit institution that conducts its activities in a Member State through a branch office or by way of the freedom to provide services, despite having been required by the competent authorities to put an end to an irregular situation, continues to violate the legal provisions of the host Member State, the FMA, having been informed by the competent authorities of the host Member State, shall take appropriate measures under § 70 para 4 to ensure that an end will be put to that irregular situation in the host Member State. The competent authority of the host Member State shall immediately be informed in writing of the measures taken.

(2) In the event of the withdrawal of the license of an Austrian credit institution, the FMA shall immediately inform thereof in writing the competent authorities of those Member States in which the credit institution conducts business.

**§ 17.** (1) If a financial institution that conducts its activities in Austria through a branch office or by way of the freedom to provide services fails to comply with the provisions of §§ 33 through 41, 44 paras 3 through 6, 60 through 63, 74, 75 and 94, with the provisions of the other federal statutes referred to in § 69 or with regulations or rulings issued on the basis of the aforementioned provisions, the FMA shall, irrespective of the application of §§ 96 and 99, require the institution concerned under threat of penalty to put an end to that irregular situation within three months. If the credit institution fails to take the necessary steps, the FMA shall inform the competent authorities of the home Member State.

(2) If, despite the measures taken or to be taken by the home Member State, the financial institution within the meaning of para 1 persists in violating the provisions listed in para 1, the FMA shall, simultaneously with imposing the penalty and informing the competent authorities of the home Member State and the European Commission,

1. prohibit entirely or in part the responsible branch office managers of the financial institution from conducting the business operation, and/or
2. in the case of further infringements prohibit the institution from initiating further business transactions in Austria.

(3) In the event of a revocation of authorization of the financial institution within the meaning of para 1, the FMA shall immediately prohibit the institution from initiating further business transactions. Paras 4 and 5 of § 6 are applicable.

(4) The competent authorities of the home Member State may, having first informed the FMA, conduct at the branch office either by themselves or through intermediaries authorized by them the verifications within the meaning of Art 18 para 2 subpara 3 of Directive 89/646/EEC that are deemed necessary for the monitoring of the branch office in the context of bank supervision. Upon request of the competent authorities the FMA may also itself conduct such verifications according to one of the methods referred to in § 70 para 1 Nos 1 through 3.

**§ 18.** *(Repealed by federal statute BGBl No 445/1996.)*

### Service of Documents

**§ 19.** In the case of service of documents by the competent authority of a host Member State that contain requests within the meaning of §§ 16 para 1 and 18 para 1, the recipient may refuse receipt pursuant to § 12 para 2 of the Service of Documents Act only if the documents are not drawn up in the official language of a Member State.

## Chapter IV
## Ownership Provisions and Permits

### Qualifying Participations in Credit Institutions

**§ 20.** (1) Whoever proposes to acquire, either directly or indirectly, a qualifying participation in a credit institution shall first inform the FMA in writing of the size of this participation. This shall not apply in case the qualifying participation is to be held through a credit institution that is subject to the duty to request a permit pursuant to § 21 para 1 No 2.

(2) Whoever proposes to increase his qualifying participation in a credit institution so that the proportion of the voting rights or the capital held by him would reach or exceed 20%, 33% or 50%, respectively, or to such extent that the credit institution would become his subsidiary, must first inform the FMA thereof in writing.

(3) The FMA shall within three months from the date of a notification pursuant to para 1 or para 2 prohibit the proposed participation, if the conditions set forth in § 5 para 1 Nos 3 through 4 a are not fulfilled. If the participation is not prohibited, the FMA may set a period within which the intentions referred to in paras 1 and 2 must be implemented.

(4) The reporting duties pursuant to paras 1 and 2 equally apply to the intended disposal of a qualifying participation or the intended reduction of participations in a credit institution below the thresholds mentioned in para 2.

(5) Credit institutions shall without delay inform the FMA in writing of any acquisition and any relinquishment of shares and of any reaching of and any surpassing of or dropping below the participation thresholds referred to in paras 1, 2 and 4 as soon as they acquire knowledge thereof. Credit institutions shall also, at least once a year, inform the FMA in writing of the names and addresses of stockholders and other shareholders holding qualifying participations and also of the size of such participations as apparent, in particular, from information received at the annual general meeting of stockholders and other shareholders or as a result of compliance with §§ 91 through 94 of the Stock Exchange Act.

(6) If there exists a danger that the influence exercised by owners of qualifying participations will not satisfy the requirements imposed in the interest of sound and prudent management of the credit institution, the FMA

shall take appropriate measures to avert this danger or to put an end to that situation. Such measures may, in particular, comprise:

1. measures within the meaning of § 70 para 2, or
2. sanctions against the managers within the meaning of § 70 para 4 No 2, or
3. the application to the competent court of first instance in commercial matters at the seat of the credit institution for an order of suspension of the exercise of the voting rights attaching to the stock or other shares held by the respective stockholders or other shareholders for the following periods:
   a) as long as the danger is imminent, the end of this period to be determined by the court, or
   b) until those stocks or other shares have been bought by third parties if no injunction pursuant to para 3 has been ordered;

   the court shall decide in a non-contentious proceeding.

(7) The FMA shall take appropriate measures, in particular pursuant to para 6 Nos 1 and 2, against the persons mentioned in paras 1 and 2, if they fail to comply with their obligation to provide prior information or if they acquire a participation despite a prohibition pursuant to para 3 or without an authorization pursuant to § 21 para 2. The voting rights attaching to the stocks or other shares held by the respective stockholders or other shareholders shall be suspended

1. until acknowledgment by the FMA that the acquisition of a participation pursuant to para 3 would not have been opposed, or
2. until acknowledgment by the FMA that the grounds for the prohibition no longer exist.

(7 a) If a court orders the suspension of the voting rights pursuant to para 6, the court shall at the same time appoint and transfer the exercise of the voting rights to a trustee who has to meet the requirements of § 5 para 1 No 3. In the case of para 7 the FMA shall without delay apply to the competent court pursuant to para 6 for the appointment of a trustee upon learning that the voting rights have been suspended. The trustee is entitled to reimbursement of his expenses and compensation for his activity in the amount to be determined by the court. The credit institution and the stockholders concerned and other stakeholders are jointly and severally liable therefore. They may appeal resolutions determining the trustee's compensation and expenses to be reimbursed. No further appeal shall lie against the decision of the Court of Appeals.

(8) Prior to his decision regarding a prohibition of a proposed acquisition of a participation, the FMA shall inform the competent authorities of another Member State, if the acquirer of the participations referred to in paras 1 and 2 is

1. a credit institution authorized in another Member State within the meaning of the first indent of Art 1 of Directive 77/780/EEC, or
2. an investment firm authorized in another Member State, or

3. a parent company of a credit institution authorized in another Member State within the meaning of the first indent of Art 1 of Directive 77/780/EEC, or
4. a parent company of an investment firm authorized in another Member State, or
5. a person controlling a credit institution authorized in another Member State within the meaning of the first indent of Art 1 of Directive 77/780/EEC or an investment firm authorized in another Member State and if, as a result of the acquisition, the credit institution or the investment firm in which the acquirer proposes to acquire a holding would become the acquirer's subsidiary or come under his control.

(9) To the extent that transactions within the meaning of paras 1 and 2 require a permit pursuant to § 21 para 1 Nos 1 through 4, paras 1 through 4 and 5 first sentence shall not apply.

**Permits**

**§ 21.** (1) A special permit by the FMA shall be required:

1. for any merger or affiliation of credit institutions;
2. whenever the thresholds of 10% (qualifying participation), 20%, 33% and 50% of the voting rights or the capital of a credit institution are reached, exceeded or undercut, if another credit institution either directly or indirectly holds, acquires or relinquishes these voting rights or the capital; excepted are participations of credit institutions in their central institution;
3. for any change in the legal form of a credit institution, unless a general partnership is transformed into a limited partnership merely by acceptance of a limited partner;
4. in case of partnerships of commercial law for the admission of a personally liable partner authorized to manage or represent the partnership;
5. for the establishment of branch offices in a third country;
6. for any de-merger of credit institutions pursuant to § 1 of the federal statute on the de-merger of companies – SpaltG, BGBl No 304/1996; and
7. for any merger or affiliation of credit institutions with non-banks with the exception of subsidiaries pursuant to § 59 para 3.

(2) The provisions of §§ 4 through 6 and 8 shall apply by analogy to the granting of permits pursuant to para 1. In the case of de-mergers, however, only § 4 para 2, § 5 para 2 and § 8 shall apply if the permit pursuant to para 1 No 6 is issued under the condition that the spun-off part is transferred to, or merged with, an existing credit institution. In the case of de-mergers leading to the establishment of a new entity, § 92 para 7 shall apply irrespective of the legal form applying to the sectoral organization.

(3) Permits within the meaning of para 1 Nos 1, 6 and 7 shall be registered in the commercial register only if accompanied by the appropriate final orders in the original or in certified copy. The competent court shall serve orders and resolutions concerning such registrations also on the FMA and on the Oesterreichische Nationalbank.

## Chapter V
## Regulatory Provisions

### Solvency

**§ 22.** (1) The own funds of each credit institution and each group of credit institutions shall at any time amount to the sum of required own funds set forth in Nos 1 through 4:

1. 8% of the assessment basis pursuant to para 2; the Federal Minister of Finance may increase this level to 8,5% by regulation, if this is in the national economic interest in a functioning banking system;
2. the own funds requirement pursuant to § 26 paras 1 or 2;
3. the own funds requirement pursuant to § 22b para 1; and
4. the own funds requirement pursuant to § 29 para 4. Irrespective of the own funds requirements referred to in Nos 1 through 4, credit institutions shall maintain the initial capital required at the stage of licensing or the initial endowment as minimum capital.

(2) The weighted asset items, the off-balance sheet transactions, and the special off-balance sheet financial transactions form the assessment basis. Excepted are the positions for which the own funds requirement is calculated pursuant to § 22b para 1. The assessment basis shall be computed as follows:

1. the book values of the asset items as adjusted shall be multiplied by the weightings mentioned in para 3;
2. for the off-balance sheet transactions referred to in Annex 1*) – after deducting provisions formed for that purpose – the risk weighted value within the meaning of para 4 shall be computed; and
3. for special off-balance sheet financial transactions pursuant to Annex 2**), the potential costs of replacing contracts in the event of counterparty default (potential compensation costs plus a general surcharge) shall be computed according to paras 5 and 6; provisions formed for individual transactions may be deducted from this value; these costs shall be multiplied by the weighting applicable to the counterparty pursuant to para 3, the highest weighting being 50%.

(3) A weighting of 100% shall be applied to all asset items, unless special weightings apply pursuant to the following Nos 1 through 8:

1. zero weighting:
   a) cash in hand in euro and in freely convertible foreign currencies, coined precious metals insofar as they are domestic or foreign legal tender;
   b) claims against the Federation, the States, the municipalities and Zone A central governments and central banks; concerning the States and municipalities the FMA shall inform the European Commission;
   c) claims against the European Communities;

*) *See infra* p. 189

**) *See infra* p. 190

d) claims carrying the explicit guarantee of the Federation, the States, the municipalities, Zone A central governments or Zone A central banks, or the European Communities;
e) claims against Zone B central governments and central banks, denominated and refinanced in the national currency of the respective borrower;
f) claims carrying the explicit guarantee of Zone B central governments or central banks, denominated and refinanced in the national currency common to the guarantor and the borrower;
g) asset items adequately secured by securities of the Federation, Zone A central governments or central banks, or the European Communities, if these securities are deposited with the lending institution; equal to these securities are securities guaranteed by the Federation, the central governments of Zone A, the central banks of Zone A, or the European Communities;
h) asset items adequately secured by cash deposits with the lending institution or by deposit certificates or similar securities, issued by the lending institution and deposited with that institution;
i) trust assets if the credit institution bears only the managing risk, bonds of own issuance, and the liquidity reserve held pursuant to § 25 para 13;
j) asset items to be deducted from own funds; and
k) deferred items that are correcting positions to own liabilities.

2. 20% weighting:
a) claims on the European Investment Bank and claims carrying the explicit guarantee of this bank;
b) claims on multilateral development banks (Annex 3)*) and claims carrying the explicit guarantees of these institutions;
c) claims on other regional governments or other local authorities within Zone A insofar as they may not be provided with a zero weighting;
d) claims carrying the explicit guarantee of the other regional governments or other local authorities of Zone A;
e) claims on domestic social security institutions, trade or professional associations and religious communities recognized by law, insofar as they are public bodies corporate;
f) claims carrying the explicit guarantee of the institutions mentioned in lit e;
g) asset items that are adequately secured by
aa) securities of the States,
bb) securities of the municipalities,
cc) securities carrying the explicit guarantee of a State,
dd) securities carrying the explicit guarantee of a municipality,
ee) deposits in other Zone A credit institutions, or
ff) deposit certificates or similar securities of other Zone A credit institutions;

*) *See infra* p. 191

the FMA shall inform the European Commission of the relevant reasons for this regulation;

h) claims on
   aa) Zone A credit institutions,
   bb) recognized investment firms,
   cc) recognized clearing houses,
   dd) recognized exchanges;
   to the extent they are not own funds of the latter;
i) claims on Zone B credit institutions with an original maturity of one year or less, with the exception of claims which are own funds of such institutions;
j) asset items carrying the explicit guarantee of
   aa) a Zone A credit institution,
   bb) a recognized investment firm,
   cc) a recognized clearing house,
   dd) a recognized exchange;
k) claims with an original maturity of one year or less carrying the explicit guaranties of Zone B credit institutions;
l) asset items that are adequately secured by securities issued by the European Investment Bank or by a multilateral development bank;
m) claims on legal persons of public law that are carried by the Federation, a State or a municipality and are not profit oriented, and companies without profit orientation owned by such a territorial public entity;
n) asset items carrying the explicit guarantee of the institutions mentioned in lit m; and
o) cash items in the process of collection;

3. 50% weighting:
   a) claims fully secured by mortgages on residential property that is currently or will in the future be personally used or let by the borrower or will be transferred into the ownership of a third party for one of these purposes; room rentals on a commercial basis being excepted therefrom; and
   b) those deferred items for which the credit institution is unable to determine the counterparty;
   c) mortgage backed securities (instruments within the meaning of Section B Nos 1 a and b of the Annex to Directive 93/22/EEC) that can be treated similarly to claims under lit a or § 103 No 10 lit f, that are fully and directly secured by a set of mortgage loans fully utilized at the time these securities are created, and an acceptable higher ranked real estate mortgage is held in an amount corresponding to the investor's securities, either directly by the investors in mortgage backed securities, or in the investor's name by a fiduciary or authorized representative;
4. investment fund certificates that convey joint property rights may be assessed with the pro rata values from the risk weighting of the fund property; they may also be provided on a pro rata basis with those weightings that result from the maximum exploitation of the highest risk categories admissible pursuant to legal provisions concerning funds;

5. asset items from leasing business shall be assessed with the cash value of the discounted leasing claims and shall be provided with the weighting of the lessee;
6. the FMA may by way of regulation fix a weighting of 10% for those claims on credit institutions that are specialized in Austria on the interbank market or the market for public bonds, if these claims are sufficiently secured through a joinder of asset items mentioned in Nos 1 and 2; with respect to similar claims on credit institutions licensed in Member States, the FMA may issue the regulation if a communication exists on the part of the European Commission, according to which the competent authorities of the home Member State confirm the existence of the aforementioned conditions; the FMA shall inform the European Commission of the issuing of such regulations and the underlying reasons;
7. the FMA may by way of regulation fix a weighting of 20% for those asset items that are adequately secured by securities in the form of transferable securities of other Zone A regional governments or other Zone A public entities, if this should lie in the national economic interest in a functioning banking system; the FMA shall inform the European Commission of the issuing of the regulation and the underlying reasons;
8. options, option rights and profit participation rights arising from the assessment of the market value of specific off-balance sheet financial transactions shall not be weighted as asset items, but as special off-balance sheet financial transactions within the meaning of paras 5 and 6.

(4) The off-balance sheet transactions listed in Annex 1 shall first be multiplied by the following percentages:

1. items with high credit risk: 100%;
2. items with medium credit risk: 50%;
3. items with below average credit risk: 20%; and
4. items with low credit risk: 0%.

Subsequently, the items weighted pursuant to Nos 1 through 4 shall be multiplied by the respective weighting pursuant to the procedure for asset items set forth in para 3. In the case of sale and repurchase transactions and forward purchases of asset items, the weighting attaching to the assets in question shall be relevant, in the case of liabilities the weighting of the primary debtor shall be relevant.

(5) The special off-balance sheet financial transactions pursuant to Annex 2 shall be weighted according to the mark to market approach or to the original exposure approach (para 6) and pursuant to the principles set forth in Nos 1 through 6:

1. the method chosen shall be uniformly applied to each individual currency or to each individual type of business listed in Annex 2;
2. a change in methods shall be permitted only from the original exposure approach to the mark to market approach;

3. credit institutions that do not apply § 22 b para 2 shall weigh all transactions listed in Annex 2 according to the mark to market approach; § 22 a para 2 shall also apply to transactions not included in the trading book;
4. transactions listed in Annex 2, Nos 3 through 6 shall be weighted according to the mark to market approach;
5. if a contract provides for repeated payment flows, the nominal value shall be adjusted according to the risk structure of the contract;
6. the following special off-balance sheet transactions shall not be included in the assessment basis:
   a) contracts traded on a recognized exchange or routed through a recognized clearing house, to the extent the required margins are to be adjusted on a daily basis;
   b) contracts concerning foreign exchange rates except contracts concerning gold with an original maturity up to 14 calendar days.

(6) When applying the mark to market approach and the original exposure approach, the following procedure shall be observed:

1. mark to market approach: in a first step, a present market value shall be attached to each contract; the positive market value shall be determined in terms of the potential costs of replacing contracts in the event of counter-party default; should no liquid market exist for a contract, the market value may be computed according to assumed market conditions; the sum of all contracts with positive market values is the potential current replacement cost; subsequently, in a second step, a general premium shall be calculated for each contract in order to determine the potential future credit exposure which is computed by way of multiplication of the nominal values of all contracts with the following percentages:

| Residual maturity | Interest rate contracts | Contracts concerning foreign exchange rates and gold | Contracts concerning equities | Contracts concerning precious metals except gold | Contracts concerning commodities and contracts referred to in No 6 of Annex 2 |
|---|---|---|---|---|---|
| 1 year or less | 0,0% | 1,0% | 6,0% | 7,0% | 10,0% |
| more than 1 year but less than 5 years | 0,5% | 5,0% | 8,0% | 7,0% | 12,0% |
| more than 5 years | 1,5% | 7,5% | 10,0% | 8,0% | 15,0% |

   a) For floating/floating interest swaps in a single currency and with interest adjustment periods of no more than six months, no general premium shall be computed;
   b) for contracts with multiple exchanges of principal, the percentages have to be multiplied by the number of remaining payments still to be made according to the contract;

c) for contracts that are structured to settle outstanding exposure following specified payment dates and where the terms are reset in such a way that the market value of the contract is zero on these specified dates, the residual maturity according to the Table equals the time until the next reset date; in the case of interest rate contracts that meet these criteria and have a remaining maturity of over one year, the nominal amounts shall be weighted with at least 0,5%.

In a third step, the potential replacement cost and the general premium shall be added; the sum shall be multiplied by the risk weightings allocated to the respective counterparties in para 3;

2. original exposure approach:
in a first step, the nominal amount of each contract shall be multiplied by the following percentages:

| Original maturity | Interest rate contracts | Contracts concerning foreign exchange and gold |
|---|---|---|
| one year or less | 0,5% | 2% |
| more than one year but not exceeding two years | 1% | 5% |
| additional allowance for each additional year | 1% | 3% |

For interest rate contracts, either original or residual maturity may be chosen; the maturity computation chosen shall be indicated in the monthly report; in a second step, the original exposure obtained shall be multiplied by the risk weighting allocated to the respective counter-party pursuant to para 3.

(6a) Contractual netting includes bilateral contracts for novation and other bilateral netting agreements. A bilateral contract for novation is a contract under which mutual claims and obligations are automatically amalgamated in such a way that each novation fixes one single net amount and thus creates a legally binding, single new contract extinguishing the former contracts.

(6b) When calculating the default risk in special off-balance sheet financial transactions, contractual netting shall be recognized under the following conditions:

1. the counterparty is empowered to enter into a contractual netting agreement; the agreement must be in writing;
2. the netting agreement creates a single legal obligation, covering all included transactions, such that, in the event of a counterparty's failure to perform due to default, bankruptcy, liquidation or any similar circumstances, the credit institution has have a claim to receive or an obligation to pay only the net value of the sum of unrealized gains and losses on included transactions;
3. the credit institution has a written legal opinion of a third party expert to the effect that, in the event of a legal challenge, the relevant courts and ad-

ministrative authorities would find that the claims and obligations of the credit institution would be limited to the net value as described in No 2; if master agreements are used, the legal opinions may also be drawn up according to groups or classes of netting agreements; the expert opinions which shall on request be submitted to the FMA and to the Oesterreichische Nationalbank shall take account of the following legal systems:
   a) the law of the jurisdiction in which the counterparty is incorporated; if a foreign branch of the credit institution or of the counterparty is involved, then also the law of the jurisdiction in which the branch is located;
   b) the law that governs the individual transactions included; and
   c) the law that governs any contract or agreement necessary to give effect to the contractual netting;
4. the credit institution shall adopt procedures which guarantee that the legal validity of netting agreements is reviewed at least once every year in light of possible changes in the relevant laws;
5. no contract may contain a provision permitting a solvent counterparty to make limited payments only, or no payments at all, to the estate of the defaulter, even if the defaulter is a net creditor (a "walk away" clause);
6. the credit institution is not in possession of information according to which the competent foreign authority has doubts concerning the legal validity of the contractual netting under applicable legal provisions; and
7. absence of a notification of the FMA pursuant to para 6c.

(6c) The bank auditor shall confirm and explain the permissibility and correctness of contractual netting as well as the fulfillment of the conditions for applying the contractual netting pursuant to para 6b in his banking supervisory audit report. Upon request, the Oesterreichische Nationalbank shall provide the FMA with an expert opinion on the permissibility and correctness of contractual netting agreements as well as the fulfillment of the conditions pursuant to para 6b. The Oesterreichische Nationalbank is entitled to procure information and documents on this issue from the competent authorities abroad. If, based on this report or other circumstances, the FMA has doubts as to the legal validity of the netting agreement, it shall notify these to the credit institution; the credit institution shall communicate a copy of this notice to the counterparty.

(6d) When applying the contractual netting, para 6 shall apply as follows:

1. in the case of bilateral contracts for novation and mark to market approach: the market value and the notional principal amounts shall be calculated taking account of the contract for novation;
2. in the case of bilateral contracts for novation and original exposure approach: the notional principal amounts shall be calculated taking account of the contract for novation;
3. other bilateral netting agreements and mark to market approach:
   a) for contracts included in a netting agreement, the market value (para 6 No 1) shall be the amount which results from the agreement; if a net li-

ability should result from the netting, the market value shall be assessed with zero;

b) when calculating the potential future credit exposure, the following shall be relied on

aa) in foreign exchange future transactions and other similar contracts, the hypothetical net replacement costs – without applying para 6e – where notional principal is equivalent to actual cash flows and the amounts to be claimed or delivered fall due on the same value date and in the same currency;

bb) in all other cases the original nominal values, at the credit institution's discretion, weighted pursuant to para 6e;

4. other bilateral netting agreements and original exposure approach:

a) in the case of foreign exchange contracts and other similar contracts in which the notional principal amount is equivalent to actual cash flows and where the amounts to be claimed or delivered fall due on the same value date and in the same currency, the notional principal amount may be calculated taking account of the netting agreement; the Table set forth in para 6 No 2 shall apply;

b) in the case of all other contracts included in a netting agreement, the notional principal amount of each individual contract shall be multiplied by the following percentage rates:

| Original maturity | Interest rate contracts | Contracts concerning foreign exchange and gold |
|---|---|---|
| One year or less | 0,35% | 1,50% |
| More than one year but not more than two years | 0,75% | 3,75% |
| Additional allowance for each additional year | 0,75% | 2,25% |

(6e) In application of para 6d No 3 the potential future credit exposure may be reduced according to the following equation:

$$PCE_{red} = 0{,}4 \times PCE_{gross} + 0{,}6 \times NGR \times PCE_{gross}$$

wherein:

$PCE_{red}$ = the reduced figure for potential future credit exposure for all contracts with a given counterparty included in a legally valid bilateral netting agreement;

$PCE_{gross}$ = the sum of the figures for potential future credit exposures for all contracts with a given counterparty that are included in a legally valid bilateral netting agreement and computed by multiplying their notional principal amounts by the percentages contained in the Table set forth in para 6 No 1;

NGR = Net-to-gross ratio according to the definition set forth in para 6f.

(6f) Credit institutions may calculate the Net-to-gross ratio in either separate or aggregate form. The method chosen is to be used consistently.

1. In the separate calculation, the Net-to-gross ratio is the quotient of the net replacement cost for all contracts included in a legally valid bilateral netting agreement with a given counterparty (numerator) and the gross replacement cost for all contracts included in a legally valid bilateral netting agreement with that counterparty (denominator);
2. in the aggregate calculation, the Net-to-gross ratio is the quotient of the sum of the net replacement cost calculated on a bilateral basis for all counterparties taking into account the contracts included in legally valid netting agreements (numerator) and the gross replacement cost for all contracts included in legally valid netting agreements (denominator).

(7) Where off-balance sheet transactions or special off-balance sheet financial transactions carry explicit guarantees, they may be weighted as if they had been incurred on behalf of the guarantor. Where the potential exposure arising from these transactions is fully secured by an asset item recognized as collateral in para 3 No 1 lit g and h or in para 3 No 2 lit g and l or in a regulation of the FMA pursuant to para 3 No 7, the weightings of the respective collateral shall apply.

(8) Where asset items, off-balance sheet transactions and special off-balance sheet financial transactions are given a lower weighting because of the existence of explicit guarantees or of an adequate security, the lower weighting shall apply only to that part which is fully covered by the guarantee or by the respective collateral.

(9) Para 3 notwithstanding, claims on regional governments and local territorial entities of the Member States may be weighted with 0% if the conditions of Nos 1 and 2 are met. This equally applies to off-balance sheet transactions incurred on behalf of such regional governments and local territorial entities and to claims of others and off-balance sheet transactions incurred on behalf of others and guaranteed by those regional governments and local territorial entities:

1. a Member State has fixed pursuant to Art 7 of Directive 89/647/EEC a weighting of 0% for its respective own regional government or local territorial entity, and
2. the European Commission has communicated this to the FMA.

(10) The Federal Minister of Finance may by way of regulation amend the provisions of Nos 1 through 4 stated hereinafter*), and the FMA may by way of regulation amend the provisions of No 5 stated hereinafter, if this should be necessary because of sufficiently specific obligations of the Republic of Austria emanating from its accession to the European Union:

1. the temporary reduction in the percentage rate pursuant to para 1 No 1 or in the weightings prescribed in para 3 in order to take account of special circumstances;

*) *See* the Regulation on the List of Multilateral Development Banks, BGBl No 730/1994, as amended by BGBl 255/1996.

2. the definition of Zone A (§ 2 No 18);
3. the list of multilateral development banks (Annex 3);
4. the amendment of asset items mentioned in para 3 in order to take account of developments on the financial markets; and
5. the list, the classification, and the valuation of off-balance sheet items (Annex 1) and of the special off-balance sheet financial transactions (Annex 2); the FMA shall inform the European Commission whenever a new off-balance sheet item is included in Annex 1.

### Valuation of the Positions of the Trading Book

**§ 22a.** Credit institutions that do not apply § 22b para 2 shall, for reporting purposes and for purposes of calculating their own funds requirement, mark to market the positions of their trading books on a daily basis at close of business at current market prices. Market prices shall be:

1. current exchange quoted prices, or
2. calculated values (cash values) that result from current market conditions.

### Own Funds Requirement For the Trading Book

**§ 22b.** (1) The own funds requirement for the trading book must be determinable on a daily basis and shall at all times amount to the sum of required own funds for

1. the specific position risk in debt instruments and monies issued in the money market pursuant to § 22g,
2. the general position risk in interest based instruments pursuant to § 22h para 3 No 9 or § 22h para 4 No 6,
3. the specific position risk in equities pursuant to § 22i para 2 in connection with § 22j para 3,
4. the general position risk in equities pursuant to § 22i para 3 in connection with § 22j para 3,
5. the risk in stock-index futures pursuant to § 22j para 2,
6. the other risks associated with options pursuant to § 22e para 4,
7. the options treated according to the scenario-matrix-method according to § 22e para 3,
8. settlement risks pursuant to § 22l,
9. free deliveries pursuant to § 22m para 2,
10. repurchase transactions, reverse purchase transactions, securities or commodities borrowing and securities or commodities lending transactions of the trading book pursuant to § 22n para 1,
11. the counterparty risk pursuant to § 22o,
12. the commodities position risk pursuant to § 22p, and
13. values at risk pursuant to § 26b para 2.

(2) Credit institutions may, contrary to para 1, calculate the own funds requirement for the trading book pursuant to § 22 para 1 No 1, if

1. the trading book business does not normally exceed 5% of the total business volume,

2. the total trading book positions do not normally exceed 15 million euro,
3. the trading book business at no time exceeds 6% of the total business volume, and
4. the sum total of the trading book positions at no time exceeds 20 million euro.

(3) Total business within the meaning of para 2 shall mean all asset items, off-balance sheet financial transactions and the special off-balance sheet financial transactions pursuant to Annex 2 to § 22; all options sold shall also be taken into consideration. In calculating the positions of the trading book and of the total business volume, debt instruments shall be valued at their market price or their nominal value and equities at their market price. Off-balance sheet transactions shall be valued at their nominal values, the special off-balance sheet financial transactions with the nominal value or market price of the instruments underlying them. Long positions and short positions shall be summed regardless of their signs.

(4) If a credit institution should exceed

1. for twelve consecutive reporting dates for the monthly report one of the limits imposed in para 2 Nos 1 and 2, or
2. once one of the limits imposed in para 2 No 3 or 4,

it shall be required, starting with the following business year, to calculate the own funds requirement for the trading book pursuant to para 1 and to notify the FMA and the Oesterreichische Nationalbank of this fact without delay. After the expiry of two business years, the calculation pursuant to para 1 may be abandoned, if in this period the limits imposed in para 2 Nos 1 and 2 have not been exceeded.

### Consolidation of the Trading Book

**§ 22c.** (1) The superordinate credit institution shall calculate the own funds requirement for the trading book of the group of credit institutions pursuant to § 22b para 1, if at least one institution member of the group is required or, in the case of group member institutions having their corporate seat abroad, would be required to perform such calculation.

(2) Those institutions belonging to the group of credit institutions that are required to apply § 22b para 1 and, in the case of group member institutions having their corporate seat abroad, those that would be required to do so pursuant to the provisions of this federal statute, shall be included into the supervision on a consolidated basis.

(3) Long positions and short positions in the same instruments of group member institutions having their corporate seat in a Member State may be summed according to their sign.

(4) Long positions and short positions in the same instruments of group member institutions having their seat in third countries may be summed according to their sign if:

1. the institution has been authorized in a third country, is supervised and either satisfies the definition of credit institution given in the first indent of

Article 1 of Directive 77/87/EEC or the definition of a recognized investment firm given in Art 1 No 2 of Directive 93/22/EEC,
2. the own funds are adequately distributed in the group of credit institutions, and
3. no regulations exist in the third country in question which might significantly impede the transfer of funds within the group.

The superordinate credit institution must be able to furnish proof at all times that these conditions are met. The bank auditor shall confirm fulfillment of the conditions in his bank supervision audit report.

(5) The superordinate credit institution shall set up within the group of credit institutions systems to monitor and control the market risks which shall also extend to those institutions whose market risks are not consolidated.

**Netting of Position Risks and Currency Conversion**

**§ 22 d.** (1) The excess of a credit institution's long positions over its short positions as well as of its short positions over its long positions in the same equities, debt instruments, convertible issues (§ 174 para 1 Stock Corporations Act 1965, BGBl No 98/1965), futures, options and warrants shall be its net position in each of these different instruments. In calculating the net position, the positions in derivative instruments shall be treated, as laid down in § 22 e paras 1 through 4, as positions in the underlying or notional securities.

(2) Convertible issues (§ 174 Stock Exchange Act) shall be treated as equity positions and may be netted with stock with respect to which the conversion right exists if:

1. the term until the day on which the conversion right into stock may be exercised for the first time is less than three months or, if a conversion was already possible, the term until the next possible conversion is less than one year, and
2. the convertible issue is traded at a premium of less than 10%. The premium is calculated as follows: market value of the convertible issue less market value of the stock into which it can be converted. It is expressed as a percentage of the market value of the stock.

(3) In order to calculate the general position risk, credit institutions may treat as fully offsetting long and short positions of the same nature in instruments derived from interest dependent basis instruments which meet the following conditions ("matched-pairs-approach"):

1. the positions are denominated in the same currency;
2. the reference rates for floating rate positions or coupon for fixed-rate positions are closely matched; this is the case if the reference rate for floating rates or the coupon for fixed-rate positions do not deviate from one another for more than 15 base points;
3. the next interest-fixing dates for floating rate positions or, for fixed coupon positions, residual maturity correspond with the following limits:
   a) less than one month hence: same day,

b) between one month and one year hence: within seven days,
c) over one year hence: within 30 days.

(4) The credit institution is required to determine its net positions in original currencies. Thereafter, the net positions shall be converted into euro at the prevailing spot exchange rate.

**Treatment of Composite Instruments and Options**

**§ 22e.** (1) When determining the position risk, interest rate futures, forward-rate agreements and forward commitments to buy or sell debt instruments shall be treated as combinations of long and short positions. The following Nos 1 through 3 shall apply in particular:

1. A long interest rate futures position shall be treated as a combination of a borrowing maturing on the delivery date of the futures contract and a holding of an asset with maturity date equal to that of the instrument or notional position underlying the futures contract in question;
2. a sold forward rate agreement shall be treated as a long position with a maturity date equal to the settlement date plus the contract period, and as a short position with maturity equal to the settlement date;
3. a forward commitment to buy a debt instrument shall be treated as a combination of a borrowing maturing on the delivery date and a long (spot) position in the debt instrument itself.

(2) Swaps shall be treated as fictitious on-balance-sheet-instruments.

(3) Options, to the extent they are not treated according to the scenario-matrix-method, shall be treated as if they were positions equal in value to the amount of the underlying instrument to which the option refers, multiplied by its delta for purposes of calculating the position risk. This shall also apply to warrants. The positions thus calculated may be netted off against any offsetting positions in the identical underlying securities or derivatives. The FMA may by way of regulation establish a precise procedure on the treatment of options according to the scenario-matrix-method.

(4) In order to safeguard against the other risks associated with options (gamma risk and vega risk) credit institutions shall apply recognized procedures and take them into account when calculating the own funds requirements. The FMA may by way of regulation establish simplifying procedures to cover these risks.*)

(5) When determining the sensitivities (delta, gamma and vega factors) pursuant to paras 3 and 4, credit institutions shall, taking into account market practices, uniformly apply to comparable option contracts option valuation models supported by automated data processing that are tested under empirical-mathematical procedures. These models shall be notified without delay to the FMA and to the Oesterreichische Nationalbank with a detailed and exhaustive description.

*) *See* the Regulation on Other Risks Associated With Options, BGBl II No 323/2000.

### Specific and General Position Risk

**§ 22 f.** (1) The position risk of interest based instruments and equities encompasses the specific and the general position risk:

1. the specific position risk is the risk of a price change in the instrument concerned due to factors related to its issuer or – in the case of a derivative instrument – of the issuer of the underlying instrument;
2. the general position risk is the risk of a price change in the position due
   a) in the case of an interest based instrument to a change in the level of interest rates, and
   b) in the case of an equity to a broad equity-market movement,

and these factors are unrelated to any specific attributes of individual securities.

(2) Shares in capital investment funds within the meaning of the Investment Funds Act 1993 and shares in foreign capital investment funds within the meaning of § 24 para 1 InvFG 1993 shall not be included in the calculation of the general and specific position risk; § 22 o shall apply to them instead.

(3) When calculating the specific position risk, the following shall be disregarded:

1. long and short positions in own issues;
2. deposits taken out on the money market;
3. refinancing of positions of the trading book;
4. derivatives of base instruments without issuers.

### Specific Position Risk in Debt Instruments and Monies Issued in the Money Market

**§ 22 g.** The credit institution shall assign its net positions and monies issued in the money market, as calculated in accordance with § 22 d, to the appropriate category in the following Table on the basis of their residual maturities and then multiply them by the weightings shown. The ownfunds requirement for the specific position risk is the sum of the aforementioned signless weighted long and short positions.

| Central government issues | Qualifying items | | | Other positions |
|---|---|---|---|---|
| | up to 6 months | over 6 and up to 24 months | over 24 months | |
| 0% | 0,25% | 1% | 1,6% | 8% |

### General Position Risk in Interest Based Instruments

**§ 22 h.** (1) Credit institutions may use a system for calculating the general position risk on interest based instruments which is maturity-based (para 3) or which reflects modified duration (para 4).

(2) The own funds requirement shall be calculated for each currency separately.

(3) If the general position risk is calculated according to maturity, the procedure involves three basic steps. First, all positions shall be weighted pursuant to No 1 according to maturity; in a second step, the positions shall be matched, when a weighted position is held alongside an opposite weighted position within the same maturity band. Then the positions shall be matched within Zones when the opposite weighted positions fall into different maturity bands, with the size of the match depending on whether the two positions fall into the same Zones (Zone: group of maturity bands), or not. In detail, the procedure shall be as follows:

1. the credit institution shall assign its net positions to the appropriate maturity bands in the Table appearing in No 4; it shall do so on the basis of residual maturity in the case of fixed-rate interest based instruments and on the basis of the period until the interest rate is next set in the case of interest based instruments on which the interest rate is floating before final maturity; the credit institution shall also distinguish between interest based instruments with a coupon of 3% or more and those with a coupon of less than 3% and accordingly place them in column 2 or column 3 in the Table appearing in No 4; it shall then multiply each interest based instrument by the weighting for the maturity band in question in column 4 in the Table appearing in No 4;
2. the credit institution shall then determine the sum of the weighted long positions and the sum of the weighted short positions in each maturity band; the weighted long position which is matched by a weighted short position in a given maturity band shall be the matched weighted position in that band, while the residual long position or short position shall be the unmatched weighted position in the same maturity band; the total of the matched weighted positions in all bands shall then be calculated;
3. computation of the positions in the respective Zones:
   a) the credit institution shall compute the totals of the unmatched weighted long positions for the bands included in each of the Zones in the Table appearing in No 4 in order to derive the unmatched weighted long position for each Zone;
   b) the credit institution shall furthermore compute the totals of the unmatched weighted short positions for the bands included in each of the Zones in the Table appearing in No 4 in order to derive the unmatched weighted short position for each Zone;
   c) that part of the unmatched weighted long position for a given Zone that is matched by the unmatched weighted short position for the same Zone shall be the matched weighted position for that Zone;
   d) that part of the unmatched weighted long position or unmatched weighted short position for a Zone that cannot be matched pursuant to lit c shall be the unmatched weighted position for that Zone;

4. maturity bands and Zones:

| Zone | Maturity bands | | Weighting (in %) | Assumed interest rate change (in %) |
|---|---|---|---|---|
| | Coupon of 3% or more | Coupon of less than 3% | | |
| Column (1) | Column (2) | Column (3) | Column (4) | Column (5) |
| Zone One | up to 1 month | up to 1 month | 0,00 | – |
| | over 1 up to 3 months | over 1 up to 3 months | 0,20 | 1,00 |
| | over 3 up to 6 months | over 3 up to 6 months | 0,40 | 1,00 |
| | over 6 up to 12 months | over 6 up to 12 months | 0,70 | 1,00 |
| Zone Two | over 1 up to 2 years | over 1,0 up to 1,9 years | 1,25 | 0,90 |
| | over 2 up to 3 years | over 1,9 up to 2,8 years | 1,75 | 0,80 |
| | over 3 up to 4 years | over 2,8 up to 3,6 years | 2,25 | 0,75 |
| Zone Three | over 4 up to 5 years | over 3,6 up to 4,3 years | 2,75 | 0,75 |
| | over 5 up to 7 years | over4,3 up to 5,7 years | 3,25 | 0,70 |
| | over 7 up to 10 years | over 5,7 up to 7,3 years | 3,75 | 0,65 |
| | over 10 up to 15 years | over 7,3 up to 9,3 years | 4,50 | 0,60 |
| | over 15 up to 20 years | over 9,3 up to 10,6 years | 5,25 | 0,60 |
| | over 20 years | over 10,6 up to 12,0 years | 6,00 | 0,60 |
| | | over 12,0 up to 20,0 years | 8,00 | 0,60 |
| | | over 20,0 years | 12,50 | 0,60 |

5. the amount of the unmatched weighted long (short) position in Zone One which is matched by the unmatched weighted short (long) position in Zone Two shall then be computed; this shall be referred to in No 9 as the matched weighted position between Zones One and Two; the same calculation shall then be undertaken with regard to that part of the unmatched weighted position in Zone Two which is left over and the unmatched weighted position in Zone Three in order to calculate the matched weighted position between Zones Two and Three;
6. the credit institution may reverse the order in No 5 so as to first calculate the matched weighted position between Zones Two and Three before calculating that between Zones One and Two;
7. the remainder of the unmatched weighted position in Zone One shall then be matched with the remaining amount for Zone Three after the latter's matching with Zone Two in order to derive the matched weighted position between Zones One and Three;
8. the residual positions resulting from the three separate matching calculations in Nos 5 through 7 shall be summed;
9. the own funds requirement shall be calculated as the sum of:
   a) 10% of the sum of the matched weighted positions in all maturity bands;
   b) 40% of the matched weighted position in Zone One;

c) 30% of the matched weighted position in Zone Two;
d) 30% of the matched weighted position in Zone Three;
e) 40% of the matched weighted positions between Zones One and Two and between Zones Two and Three (pursuant to No 5);
f) 150% of the matched weighted position between Zones One and Three;
g) 100% of the residual unmatched weighted positions.

(4) If the general position risk in interest based instruments is calculated according to a system which reflects duration, the credit institution shall proceed on a consistent basis as follows:

1. the credit institution shall take the market value of each fixed rate instrument and then calculate its yield to maturity, which at the same time is the implied discount rate for that instrument; in the case of floating rate instruments, the institution shall take the market value of each instrument and then calculate its yield on the assumption that principal is due when the interest rate can next be changed;
2. the credit institution shall then calculate the modified duration of each instrument on the basis of the following formula:

duration (D):

$$D = \frac{\sum_{t=1}^{m} \frac{t\,C_t}{(1+r)^t}}{\sum_{t=1}^{m} \frac{C_t}{(1+r)^t}}$$

$$\text{modified duration} = \frac{\text{duration(D)}}{(1+r)}$$

where:
r = yield to maturity (according to No 1),
$C_t$ = cash payments in time t,
m = total maturity (according to No 1);

3. the credit institution shall then allocate each instrument to the appropriate Zone in the following Table; it shall do so on the basis of the modified duration of each instrument:

| Zone | Modified Duration (in years) | Assumed Interest Rate Change (in %) |
|---|---|---|
| One | $>0 \leq 1{,}0$ | 1,0 |
| Two | $>1{,}0 \leq 3{,}6$ | 0,85 |
| Three | $>3{,}6$ | 0,7 |

4. the credit institution shall then calculate the duration-weighted position for each instrument by multiplying its market price by its modified duration and by the assumed interest rate change for the respective Zone;

5. the credit institution shall work out its duration-weighted long and its duration-weighted short positions within each Zone. The amount of the former which are matched by the latter within each Zone shall be the matched duration-weighted position for that Zone. The credit institution shall then calculate the unmatched duration-weighted positions for each Zone. It shall then follow the procedures laid down for unmatched weighted positions in para 3 Nos 5 through 8;
6. the own funds requirement shall be calculated as the sum of:
   a) 2% of the matched duration-weighted position for each Zone;
   b) 40% of the matched duration-weighted positions between Zones One and Two and between Zones Two and Three;
   c) 150% of the matched duration-weighted position between Zones One and Three;
   d) 100% of the residual unmatched duration-weighted position.

**Specific and General Position Risk in Equities**

**§ 22i.** (1) The credit institution shall sum separately all its net long positions and all its net short positions in equities calculated in accordance with § 22d to determine its overall gross position. The overall net position is, separately for each national stock market, the sign-neutral difference between net long positions and net short positions in equities.

(2) The own funds requirement against specific risk for equities shall be 4% of the overall gross position. This percentage shall be reduced to 2% for those equities which meet the following conditions:

1. the equities are those of issuers which have issued exchange-traded debt instruments and are to be weighted lower than 8% in the specific position risk;
2. the equities must be highly liquid; this is the case when they are included in an index of most traded securities published by a recognized exchange;
3. the equities may not bear a special risk because of lacking financial standing of the issuer; and
4. no individual position shall comprise more than 5% of the value of the credit institution's whole equity portfolio; this percentage shall be 10% for individual positions, provided that the total value of such positions does not exceed 50% of the whole equity portfolio.

(3) The own funds requirement against general risk for equities shall be 8% of the overall net position calculated in accordance with para 1.

**Position Risk in Stock-Index Futures**

**§ 22j.** (1) Stock-index futures, the delta-weighted equivalents of options in stock-index futures and stock indices, collectively referred to hereinafter as "stock-index futures", may be broken down into positions in each of their constituent equities or treated as separate positions. Opposite positions in stock-index futures may be netted only in the case of identical indices and matching maturities. Maturities shall be considered as matching within the following limits:

1. in the case of terms up to one month: the same day;
2. in the case of terms from one month up to one year: seven days; and
3. in the case of more than one year: 30 days.

(2) Stock-index futures broken down into positions in each of their constituent equities may be netted off against opposite positions in the same equities. The own-funds requirement to cover the risk of loss caused by the stock-index future not moving fully in line with that of its constituent equities, amounts to 0,5% of the matched positions following a breaking-down of the index.

(3) If a stock-index future is treated as if it were an individual equity position, the own funds requirement for the general and specific position risk shall be calculated pursuant to § 22i. As an exception to this procedure, stock-index futures with the Austrian Traded Index (ATX) of the Vienna Stock Exchange as base instrument and stock-index futures which are traded on a recognized exchange and represent an index formed by at least 20 titles, shall be disregarded in the calculation of the specific position risk. These stock-index futures shall only be included in the calculation of the overall net positions.

### Underwritings

**§ 22k.** (1) Credit institutions shall allocate underwritings for securities in the amount of the net position to the respective long position. The net position is the gross position minus the underwritings of third parties on the basis of a written agreement. If an underwriting is provided in the context of a public offer (§ 1 para 1 No 1 Capital Market Act, BGBl No 625/1991), the weighted net position may be treated as the respective long position. The latter results from the net positions being multiplied with the following weightings:

1. from the day the underwriting is provided up to working day 0:5%;
2. on working day 1:10%;
3. on working days 2 and 3:25%;
4. on working day 4:50%;
5. on working day 5:25%;
6. after working day 5:100%.

(2) Working day 1 within the meaning of para 1 No 2 shall be the working day on which the credit institution has entered the unconditional commitment to accept a known quantity of securities at an agreed price.

### Settlement Risk

**§ 22l.** (1) In the case of transactions in debt instruments, equities and commodities which remain unsettled after their due delivery dates, the credit institution shall calculate the own funds requirement pursuant to No 1 or No 2. The chosen method shall be mentioned in the monthly report. A change in method is permitted only from No 2 to No 1.

1. The credit institution shall calculate the difference between the agreed settlement price and the current market value of the securities or commodities; the own funds requirement is the sum of the existing differences at the expense of the credit institution, weighted with the respective factors of the following Table; a set-off with differences to the benefit of the credit institution shall not take place.

| Number of working days after the due settlement date | Weighting factor (in %) |
|---|---|
| 5–15 | 8 |
| 16–30 | 50 |
| 31–45 | 75 |
| 46 or more | 100 |

2. In the case of transactions in debt instruments and equities which remain unsettled between 5 and 45 working days after the due delivery date, the own funds requirement shall amount to the settlement price, weighted with the appropriate factor of the following Table; from the 46th working day after the due date, the own funds requirement shall be calculated pursuant to No 1.

| Number of working days after the due settlement date | Weighting factor (in %) |
|---|---|
| 5–15 | 0,5 |
| 16–30 | 4,0 |
| 31–45 | 9,0 |

(2) Para 1 does not apply to transactions under § 22 n.

**Free Deliveries**

**§ 22 m.** (1) Free deliveries have been executed if the credit institution

1. has paid for securities or commodities before receiving them, or
2. has delivered securities or commodities before receiving payment for them

and at least one day has elapsed since payment or delivery. In No 1 the earlier of the two days (value date and calendar date) on which payment has actually been made shall be relevant, in No 2 the value date.

(2) The own funds requirement shall be 8% of the weighted free delivery. In case of pre-payment (para 1 No 1), the free delivery is the market value of the securities, in case of delivery (para 1 No 2) the amount owed to the credit institution, multiplied by the risk weighting applicable to the counterparty pursuant to § 22.

### Repurchase Agreements, Securities and Commodities Lending

**§ 22 n.** (1) The own funds requirement for the default risk of securities or commodities repurchase agreements, securities or commodities lending, reverse purchase agreements and borrowing of securities or commodities included in the trading book shall be 8% of the positive excess amounts (para 2), multiplied by the risk weightings applicable to the relevant counterparty pursuant to § 22. Positive excess amounts whose return is guaranteed by a Zone A central government or central bank, a recognized stock exchange or a recognized clearing house shall be disregarded. The positive excess amount of the security shall be calculated as follows:

1. in the case of repurchase transactions included in the trading book, the difference between the market value of the securities or commodities lent and the amount borrowed;
2. in the case of securities or commodities lending transactions included in the trading book, the difference between the market value of the securities or commodities and the market value of the collateral it has received;
3. in the case of reverse purchase transactions included in the trading book, the difference between the amount lent and the market prices of the securities or commodities it has received;
4. in the case of securities or commodities borrowing transactions included in the trading book, the difference between the market value of the collateral and the market value of the securities or commodities received.

Accrued interest shall be included in calculating the market value of amounts lent or borrowed and collateral. A positive excess amount shall not be set-off with negative values.

(2) In the case of securities or commodities lending based on the trading book, credit institutions must take care that, taking into account the risk of the transaction, the market value (cash value) of the collateral exceeds the market value of the securities.

(3) In the case of repurchase transactions in securities included in the trading book, the securities and legal claims to securities concerned shall be included in the calculation of the general and specific position risk; this shall also apply if the securities are included in the balance sheet of the counter party. In such case the transaction shall be split; each party shall have to provide for only half of the own funds requirement.

### Default Risk*)

**§ 22 o.** (1) The own funds required to cover the default risk in

1. shares in capital investment funds pursuant to § 5 para 1 Investment Funds Act 1993,
2. shares in foreign capital investment funds pursuant to § 24 para 1 Investment Funds Act 1993,

*) In the Index, the heading of § 22 o reads "Over-the-Counter Derivative Instruments and Other Positions in Connection with Trading in Financial Instruments".

3. other positions connected to the trading in financial instruments (§ 2 No 35 lit f) and not included in calculating the general and specific position risk; as well as
4. over-the-counter derivative instruments

shall be calculated pursuant to the provisions of § 22.

**Commodities Risk**

**§ 22p.** (1) The procedure for calculating the commodities risk is as set forth in Nos 1 through 7 hereinafter:

1. Each position in commodities or commodity derivatives shall be expressed in terms of the standard unit of measurement. The spot price in each commodity shall be expressed in euro.
2. Positions in gold or gold derivatives shall be considered as being subject to foreign-exchange risk and treated according to § 26 or § 26b, for the purpose of calculating market risk.
3. Positions which are purely stock financing shall be excluded from the commodities risk calculation.
4. The interest-rate and foreign-exchange risks not covered by provisions of this section shall be included in the calculation of general risk for traded debt instruments (§ 22h) and in the calculation of foreign-exchange risk (§ 26).
5. When the short position falls due before the long position, credit institutions shall also guard against the risk of a shortage of liquidity which may exist in some markets.
6. For the purpose of para 15, the excess of a credit institution's long (short) positions over its short (long) positions in the same commodity and identical commodity futures, options and warrants shall be its net position in each commodity. Positions in derivative instruments pursuant to paras 2 through 4 shall be treated as positions in the underlying commodity.
7. The following positions shall be regarded as positions in the same commodity:
   a) positions in different sub-categories of the same commodity in cases where the sub-categories are deliverable against each other, and
   b) positions in similar commodities if they are close substitutes and if a minimum correlation of 0,9 between their price movements can be clearly established over a minimum period of one year.

(2) Commodity futures and forward commitments to buy or sell individual commodities shall be incorporated in the risk measurement system as notional amounts in terms of the standard unit of measurement and assigned a maturity with reference to expiry date.

(3) Commodity swaps where one side of the transaction is a fixed price and the other the current market price shall be incorporated into the maturity ladder approach as a series of positions equal to the notional amount of the contract, with one position corresponding with each payment on the swap and slotted into the maturity ladder set out in the table appearing in para 8. The positions are long positions if the institution is paying a fixed

price and receiving a floating price and short positions if the institution is receiving a fixed price and paying a floating price. Commodity swaps where the sides of the transaction are in different commodities are to be reported in the relevant reporting ladder for the maturity ladder approach.

(4) Options on commodities or on commodity derivatives shall be treated as if they were positions equal in value to the amount of the underlying to which the option refers, multiplied by its delta. The latter positions may be netted off against any offsetting positions in the identical underlying commodity or commodity derivative.

(5) The credit institutions shall use recognized approaches that safeguard against the other risks associated with commodity options (gamma and vega risks) and base the calculation of the own funds requirement thereon. The Federal Minister of Finance may, by way of regulation, set simplified approaches to safeguard against these risks.

(6) § 22e paras 4 and 5 shall apply when determining the sensitivities (delta, gamma and vega factor) pursuant to paras 4 and 5.

(7) Warrants relating to commodities shall be treated in the same way as commodity options.

(8) The credit institution shall use a separate maturity ladder in line with the following table for each commodity. All positions in that commodity and all positions which are regarded as positions in the same commodity pursuant to para 1 No 7 shall be assigned to the appropriate maturity bands. Physical stocks shall be assigned to the first maturity band.

| Maturity band<br><br>(1) | Spread rate<br>(in %)<br>(2) |
|---|---|
| 0 ≤ 1 month | 1.50 |
| > 1 ≤ 3 months | 1.50 |
| > 3 ≤ 6 months | 1.50 |
| > 6 ≤ 12 months | 1.50 |
| > 1 ≤ 2 years | 1.50 |
| > 2 ≤ 3 years | 1.50 |
| > 3 years | 1.50 |

(9) Positions which are, or are regarded pursuant to para 1 No 7 as positions in the same commodity, may be offset and assigned to the appropriate maturity bands on a net basis for:

1. positions in contracts maturing on the same date, or
2. positions in contracts maturing within 10 days of each other if the contracts are traded on markets which have daily delivery dates.

(10) The credit institution shall calculate the sum of the long positions and the sum of the short positions in each maturity band. The amount of the long positions which are matched by the sum of the short positions in a given maturity band shall be the matched positions in that band, while the residual long or short position shall be the unmatched position for the same band.

(11) That part of the unmatched long or short position for a given maturity band that is matched by the unmatched short or long position for a maturity band further out shall be the matched position between two maturity bands. That part of the unmatched long or unmatched short position that cannot be thus matched shall be the unmatched position.

(12) The institution's capital requirement for each commodity shall be calculated on the basis of the relevant maturity ladder as the sum of the following:

1. the sum of the matched long and short positions, multiplied by the appropriate spread rate as indicated in the second column of the table appearing in para 8 for each maturity band and by the spot price for the commodity;
2. the matched position between two maturity bands for each maturity band into which an unmatched position is carried forward, multiplied by a carry rate (§ 103 No 11 d) of 0,6% and by the spot price for the commodity;
3. the residual unmatched positions, multiplied by an outright rate (§ 103 No 11 d) of 15% and by the spot price for the commodity.

(13) The credit institution's overall capital requirement for commodities risk shall be calculated as the sum of the capital requirements calculated for each commodity according to para 12.

(14) The capital requirement for commodities and commodity derivatives may also be calculated pursuant to the provisions of Nos 1 and 2. The capital requirement of a credit institution shall be the sum of:

1. 15% of the net position, long or short, multiplied by the spot price for the commodity;
2. 3% of the gross position (long plus short), multiplied by the spot price for the commodity.

(15) The credit institution's overall capital requirement for commodities risk shall be calculated as the sum total of the capital requirements calculated for each individual commodity according to para 14.

### Own Funds

**§ 23.** (1) The following components shall be counted towards own funds:

1. paid-up capital pursuant to para 3;
2. disclosed reserves including the liability reserve pursuant to para 6; the interim profit in the current business year shall be counted towards the disclosed reserves only if
   a) it has been calculated in accordance with the principles set out in Chapter XII after deducting all foreseeable taxes, charges and dividends, and
   b) the bank auditor has verified the accuracy of the calculation pursuant to lit a;
3. funds for general banking risks pursuant to § 57 paras 3 and 4;
4. hidden reserves pursuant to § 57 para 1;

5. supplementary capital pursuant to para 7 and participation capital (paras 4 and 5) with the obligation of subsequent payment of dividends;
6. subordinated capital pursuant to para 8;
7. revaluation reserves pursuant to para 9;
8. the liability sum surcharge pursuant to para 10; and
9. short term subordinated capital pursuant to para 8 a.

(2) The components of own funds pursuant to para 1 shall be reduced in advance by the book values of those asset items that result from own issuings or that have been acquired by the credit institution from a controlling company.

(3) Paid-up capital shall comprise:

1. as concerns partnerships of commercial law, such capital as has been dedicated to the company plus claims of the personally liable partners arising from the business activities of the enterprise minus the losses, withdrawals and liabilities of the personally liable partners to the company;
2. as concerns stock corporations and limited liability companies, the paid-up share capital;
3. as concerns cooperatives, the money contributions paid in on the shares;
4. as concerns savings banks, the paid-up capital on formation;
5. as concerns State mortgage banks and the Mortgage Bond Division of the Austrian State Mortgage Banks, the paid-up capital;
6. as concerns branch offices of foreign credit institutions, the endowment capital put at their disposal in freely convertible currency; and
7. *(Repealed by federal statute BGBl I No 25/2000.)*
8. as concerns credit institutions, the participation capital (paras 4 and 5) without obligation of subsequent payment of dividends.

(4) Participation capital comprises capital:

1. which has been paid-up and, for the duration of the company, is placed at its disposal under waiver of extraordinary and ordinary notice;
2. which may be repaid only by analogous application of the rules for reduction of capital as set forth in the Stock Corporation Act or by redemption pursuant to § 102 a;
3. the earnings of which are dependent upon profit, profit being defined as the result of the business year (annual profit) after change of reserves shown on the balance sheet;
4. which, equivalent to share capital, fully participates in the loss;
5. which is connected with the right to participate in the liquidation proceeds and may only be repaid after satisfaction of or providing security to all other creditors.
6. *(Repealed by federal statute BGBl No 445/1996.)*

(5) If by any measure the existing ratio between the property rights of the holders of the participation certificates and the property rights connected with own funds as set forth in para 1 is altered, an appropriate adjustment shall take place. This provision shall also apply to the issuing of stock and of bonds and profit participation rights set forth in § 174 of the Stock Corpora-

tion Act. For this purpose the preemptive right of shareholders pursuant to § 174 para 4 Stock Corporation Act may be excluded. Holders of participation certificates shall have the right to take part in the shareholders' meeting and request information within the meaning of § 112 of the Stock Corporation Act. In savings banks, State mortgage banks, the Mortgage Bond Division of the Austrian State Mortgage Banks, in credit institutions having the legal form of partnerships of commercial law and in the Österreichische Postsparkasse, an opportunity shall likewise be given to the holders of participation certificates once a year to request information from the managers of the credit institution in a meeting in which a report is to be given on the annual financial statement. The provisions of the Stock Corporation Act for calling the shareholders' meeting shall apply by analogy to the calling of such meeting.

(6) Credit institutions shall form a liability reserve. It amounts to 1% of the assessment basis pursuant to § 22 para 2; credit institutions that do not apply § 22 b para 2 shall add to the assessment basis the positions of the trading book, weighted according to § 22. A release of the liability reserve is allowed only to such extent as is necessary to fulfill obligations pursuant to § 93 or to cover losses otherwise to be shown in the annual financial statement. The liability reserve shall be replenished to the extent of the released amount no later than within the following five fiscal years. The allocation to and release of the liability reserve shall be shown separately in the profit and loss account.

(7) Supplementary capital refers to those paid-up own funds:

1. which, under a respective agreement, are placed at the disposal of the credit institution for at least eight years and which may not be terminated by the creditor prior to the expiration of that term; on the part of the credit institution, premature termination is permissible only pursuant to No 5;
2. for which interest may be paid out, to the extent it is covered by annual surplus (prior to movements of reserves);
3. which, prior to liquidation, may be repaid only subject to pro rata deduction of the net losses which have occurred during their term;
4. which are subordinated pursuant to § 45 para 4;
5. whose residual maturity is at least three years; the credit institution may, effective prior to the expiration of the original maturity of three years, terminate without period of notice if this is contractually permissible and if the credit institution has previously procured capital in equal amount and of at least equal own funds quality, and if the bank auditor has certified this fact.
6. *(Repealed by federal statute BGBl No 445/1996.)*

(8) Subordinated capital refers to those paid-up own funds that are subordinated pursuant to § 45 para 4 and which meet the following conditions:

1. the total term shall be at least five years; if a term has not been fixed or if either the credit institution or the creditor has a right of termination, the period of notice shall be at least five years; the credit institution, on the other hand, may without period of notice give notice after a term of five

years if it has previously raised capital of equal amount and of at least equal own funds quality; furthermore, the term of five years does not have to be met, if bonds are prematurely canceled because of a change in taxation that leads to an additional payment to the creditor and the credit institution has previously raised capital in the same amount and of at least equal own funds quality; in case notice is given as to subordinated capital, the bank auditor shall certify that before notice was given capital in equal amount and of at least equal own funds quality was procured;

2. the conditions may not contain clauses according to which the debt would be repayable prior to the repayment date agreed upon under circumstances other than the liquidation of the credit institution or pursuant to No 1, or according to which changes of the indenture agreement concerning the subordination are possible;
3. certificates on subordinated deposits, bonds or global certificates as well as subscription and purchase orders have to expressly contain the conditions of subordination (§ 864 a Civil Code);
4. the set-off of the repayment claim against claims of the credit institution must be excluded and no contractual collateral may be attached to the liabilities by either the credit institution or third parties; and
5. in transactions with customers the designation has to be chosen in such a way as to exclude any possibility of them being mistaken for other deposits or bonds.

(8 a) Short term subordinated capital shall be those paid up own funds that are subordinated pursuant to § 45 para 4 and meet the following conditions:

1. total maturity amounts to at least two years; if a maturity is not set or notice by the credit institution or the creditor is possible, a period of notice of at least two years is to be provided for; the credit institution, however, may give notice after two years without respect to a period of notice, if prior to giving notice it has procured capital in the same amount and of at least the same own funds quality; furthermore, the term of two years does not have to be complied with, if notice is given with respect to convertible issues because of a change in taxation leading to an additional payment to the creditor and if the credit institution, prior to giving notice, has procured capital in the same amount and of at least the same own funds quality; in the case notice is given with respect to short term subordinated capital, the bank auditor shall certify that before notice was given, capital in the same amount and of at least the same own funds quality had been procured;
2. the conditions of para 8 Nos 2 through 5;
3. it has been contractually agreed that neither redemption nor interest payments may be effected which would lead to the credit institution's own funds to be taken into account falling below 100% of the own funds requirement pursuant to § 22 para 1 Nos 1 through 4.

(9) Revaluation reserves are unrealized gains in the amount of 45% of the following differences in amount:

1. as concerns real estate, rights similar to real estate and buildings: the book value and the market value certified by an expert; when computing the market value certified by an expert, § 12 paras 1 and 2 of the Mortgage Banks Act shall apply; those values shall be computed at least every three years by expert valuation opinions for the drawing up of which a credit institution shall appoint an expert committee consisting of at least three members; if the market value determined by expert opinion is below the book value, the revaluation reserves shall be reduced by this negative value;
2. as concerns transferable securities admitted to official listing on a stock exchange or in another organized market that is recognized and open to the public and functioning in an orderly manner: the book value and the listed price; in case of special circumstances a lower value than the stock exchange quoted value shall be assessed; if the valuation of securities pursuant to the principles of fixed asset items is used, the revaluation reserves shall be reduced by the differential amount between the true value and the higher book value. When computing the differential amount, hidden reserves pursuant to § 57 para 1 shall be added to the book value of the securities; and
3. as concerns investment certificates of capital investment funds that
   a) were set up pursuant to Directives 85/611/EEC and 88/220/EEC and
   b) whose fund provisions contain a redemption obligation of the investment company at the indicated redemption price:
   the book value and the redemption price.

Revaluation reserves may be taken into account only if all asset items of Nos 1 through 3 are included in the computation of the differential amounts.

(10) Cooperatives may count the partners' obligation to make additional contributions as liability sum surcharges towards own funds. In case of limited liability cooperatives the liability sum surcharge amounts to 75% of the total amount of the obligation to make additional contributions set by the articles of association. In case of unlimited liability cooperatives it amounts to double the total amount of the underwritten shares. Liability sums and shares of members resigning at the end of the business year shall not be taken into account when computing the liability sum surcharge.

(11) Own funds in foreign currency shall be converted into Schillings. In case of currencies officially quoted on the Vienna Stock Exchange the spot rates of the last stock exchange day, in case of other currencies the buying rates in the Austrian semi-official market shall govern.

(12) Own funds pursuant to para 1 Nos 1 through 4 must be available to the credit institution for unrestricted and immediate use to cover risks or losses as soon as these occur. Own funds must be net of any foreseeable tax charge at the moment of their calculation or be suitably adjusted in so far as taxes on earnings reduce the amount up to which these items may be applied to cover risks or losses.

(13) In accordance with para 14, the following shall be deducted from own funds:

1. intangible assets pursuant to Assets item 9 of Annex 2 to § 43, part 1;
2. the net loss as well as substantial negative results in the ongoing business year;
3. shares held directly and indirectly as well as subordinated claims, participation capital, supplementary capital or other forms of capital recognized as own funds pursuant to the respective applicable foreign law, held by the credit institution in other credit institutions or financial institutions of which it holds more than 10%;
4. shares held directly or indirectly, subordinated claims, participation capital, supplementary capital or other forms of capital recognized as own funds pursuant to the respective applicable foreign law, held by the credit institution in credit and financial institutions other than the ones referred to in No 3, in the total amount of these shares, subordinated claims, participation capital, supplementary capital as well as other capital components that exceed 10% of the computed own funds of the credit institution prior to deducting the components listed under Nos 3 and 4;
5. when performing a full consolidation pursuant to § 24 para 1, a proportional consolidation pursuant to § 24 para 4, and in case of an obligation to deduct pursuant to para 2, the deduction pursuant to Nos 3 and 4 shall not occur;
6. credit institutions affiliated with a central institution shall not perform the deduction pursuant to Nos 3 and 4 with respect to their shares held directly or indirectly in the central institution, if
   a) the central institution proves compliance with the provisions on own funds in a consolidated computation of own funds of the sector in its monthly report,
   b) all credit institutions affiliated with the central institution of the respective sector communicate the necessary information to the latter in order to enable it to perform the consolidation, and
   c) the central institution communicates the result of the consolidated computation of own funds to the affiliated credit institutions.

(14) Own funds shall be taken into account as follows:

1. Own funds pursuant to para 1 Nos 1 through 3 shall be taken fully into account and, after deduction of the amounts pursuant to para 13 Nos 1 and 2, form the core capital.
2. The sum of own funds pursuant to para 1 Nos 4 through 8 shall be taken into account up to 100% of the core capital.
3. Own funds pursuant to para 1 Nos 6 and 8 shall be taken into account up to 50% of the core capital.
4. Revaluation reserves shall be attributable to own funds up to an amount of 1.5% of the assessment basis pursuant to § 22 para 2, if the core capital amounts to at least 4.5% of the assessment basis; credit institutions that do not apply § 22b para 2 shall add to the assessment basis the positions of the trading book, weighted according to the provisions of § 22.
5. Following a date of five years prior to the repayment date, subordinated capital may be taken into account decreasingly in five equal annual install-

ments prior to considering the other limitations on taking capital into account.

6. The liability sum surcharge shall be taken into account up to 25% of the core capital.
7. Short term subordinated capital exclusively to meet the own funds requirement under § 22 b para 1 and § 26 para 1 and only up to an amount which, together with the own funds to be taken into account pursuant to para 1 Nos 4 through 8 which the credit institution does not need to meet the own funds requirement under § 22 para 2 and § 29 para 4, does not exceed 200% of the core capital that the credit institution does not need to meet the own funds requirement under § 22 para 2 and § 29 para 4; to the extent the credit institution does not avail itself of the possibility to take into account subordinated short term capital, it may replace it with own funds components not to be taken into account pursuant to Nos 2 through 6;
8. The sum of the amounts pursuant to para 13 Nos 3 and 4 shall be deducted from the sum of own funds pursuant to Nos 1 through 7.

(15) Stocks, shares, participation capital and supplementary capital as well as subordinated and short term subordinated capital from own issuings shall be shown separately in the notes on the accounts; this also applies to shares and other own funds issued by a controlling company.

(16) Own participation capital, participation capital in a dependent company or of a controlling company may not exceed 10% of the issued participation capital. The provisions of §§ 65 through 66 a Stock Corporation Act concerning the acquisition, the sale, the redemption, the pledging of own stock, the acquisition of own stock by third parties and the financing of the acquisition of the corporation's stock shall apply. Supplementary capital, subordinated capital and short term subordinated capital from own issuance and these capital components of a controlling company may, respectively, not exceed 10% of the supplementary capital, the subordinated capital and the short term subordinated capital issued by the credit institution.

(17) *(Repealed by federal statute BGBl No 445/1996.)*

### Consolidated Own Funds

**§ 24.** (1) The superordinate credit institution shall consolidate the assessment basis pursuant to § 22 para 2, the positions of the trading book pursuant to the rules set forth in § 22 c, the open foreign currency positions and gold pursuant to § 26 and the own funds (§ 23) of the group of credit institutions pursuant to the procedures of a full consolidation. In deviation thereof, the procedure of partial consolidation shall apply to subordinated institutions pursuant to § 30 para 1 No 7. Own funds of the superordinate credit institution that belong to a subordinated institution appertaining to the consolidated group shall be considered own shares pursuant to § 23 para 2.

(2) The following items shall be added to the consolidated disclosed reserves as liability items and shall reduce the latter, insofar as they are asset items:

1. shares of other shareholders pursuant to § 259 para 1 Commercial Code including the hybrid capital pursuant to Nos 5 and 6; hybrid capital may be counted towards the consolidated own funds only up to a maximum amount of 15% of the consolidated core capital pursuant to § 23 para 14 No 1 and this only if at the time of the issue the superordinated credit institution and group of credit institutions meet the own capital requirement pursuant to § 22 para 1; if no increase agreement pursuant to para 2 No 6e exists, however, it may be counted towards consolidated own funds up to a maximum of 30%;
2. the differential amount resulting from the consolidation of own capital and participations within the meaning of § 254 para 3 Commercial Code (capital consolidation);
3. differences due to the conversion of foreign currencies that accrue in the context of consolidation upon conversion of own capital available at the beginning of the business year of a subordinated institution; and
4. a differential amount resulting from the equity valuation within the meaning of § 264 para 2 Commercial Code.
5. hybrid capital is capital which
   a) is fully paid-up;
   b) does not carry an obligation to pay dividends in arrears;
   c) is able to absorb losses of the superordinated credit institution even prior to the initiation of an insolvency procedure;
   d) is subordinated to deposits, other liabilities and other subordinated liabilities;
   e) is put at the institution's lifetime disposal;
   f) is unsecured, not guaranteed by a third party or a company connected with the issuer and is not subject to conditions or connected with financial instruments that from a legal or economic perspective produce equal or preferred standing vis-à-vis other creditors of the credit institution or group of credit institutions;
   g) may be terminated by giving extraordinary notice only if it can be replaced by capital of equal or better quality and if either termination because of important changes in tax treatment is not unreasonable or if the statutory inclusion into own capital changes; the condition of replacement lapses if the FMA determines that even after repayment the credit institution and the group of credit institutions dispose of adequate own funds required for an adequate risk coverage;
   h) may be terminated by the issuer only after five years under the condition that it is replaced with capital of equal or better quality; the condition lapses if the FMA determines that even after repayment the credit institution and the group of credit institutions dispose of adequate own funds required for an adequate risk coverage;
6. the following provisions shall furthermore apply to hybrid capital:
   a) the controlling constituents of hybrid capital must be published in easily understandable format in a printed publication medium with Austria-wide distribution or on the internet on the homepage of the issuer and of the superordinated credit institution;

b) if the proceeds from the issue of the hybrid capital are available to the superordinated credit institution only through a company of the group of credit institutions, they must be made available to the former either immediately as core capital or as capital pursuant to § 23 para 1 No 5 or when a predetermined event occurs; such an event is for instance the falling beneath a certain own funds ratio or below an amount of own funds to be taken into account;
c) the superordinated credit institution must have the power to control the amount and timing of dividend payments;
d) dividends may be paid only out of distributable profits; if the amount of the dividend is guaranteed, a change thereof may not be linked to the rating of an institution of the group of credit institutions;
e) an increase of a minimum dividend in connection with a termination right of the issuer may be agreed on only if
aa) the agreed increase takes effect only after a ten year term;
bb) only one agreement to increase is fixed; and
cc) the agreement to increase does not exceed the following thresholds: 100 basis points as compared to the initial minimum dividend or 50% of the initial return on investment difference between the minimum dividend and a comparable reference value.

(3) Paras 1 and 2 shall apply pursuant to the following provisions:

1. paras 1 and 2 Nos 1 through 3 as to companies belonging to the group of credit institutions;
2. para 2 No 4 as to participations in credit institutions, financial institutions, investment firms and ancillary banking services companies, if they do not belong to the group of credit institutions or are not voluntarily included in the proportional consolidation (para 4);
3. para 2 No 4 may also be uniformly applied to all participations in companies that are not credit institutions, financial institutions, investment firms or ancillary banking services companies. In so doing the definition of "participation" used in § 228 paras 1 and 2 Commercial Code may be used and § 263 para 2 Commercial Code (exemption of a participation) may be taken advantage of; and
4. the amounts pursuant to para 2 may be taken from the latest consolidated financial statement if intermediate changes are insignificant.

(4) If a credit institution either directly or indirectly holds participations in other credit or financial institutions in the amount of more than 10% of the capital of these institutions, and if these do not belong to the group of credit institutions, a proportional consolidation within the meaning of § 262 Commercial Code may be performed. A deviation from the proportional consolidation shall be permissible only in justified instances. Para 2 Nos 2 and 3 are applicable.

(5) The bank auditor of the superordinate credit institution shall include the statement on consolidation of own funds in the bank supervision audit report.

**Liquidity**

**§ 25.** (1) Credit institutions shall ensure that they are able to meet their payment obligations at any time. They shall:

1. adopt a company-specific finance and liquidity planning based on banking experience,
2. adequately provide for the settlement of future disparities of cash income and cash expenditures by permanently holding adequate liquid funds,
3. maintain systems to monitor and control the interest rate risk on all of their transactions,
4. according to the maturity structure of their claims and liabilities organize in particular their interest adjustment and termination options in a way that enables them to take account of possible changes in the market conditions, and
5. have documentation on the basis of which the credit institution's financial position can be calculated with reasonable accuracy at any time; upon request, these documents shall be provided with the appropriate comments and submitted to the FMA.

(2) In their monthly reports, credit institutions shall list their claims and liabilities separately according to periods of notice or terms, pursuant to the regulation to be enacted pursuant to § 74 para 5. In the same manner fixed-interest claims and liabilities, the interest rates of which, by agreement, may be changed only after a one-year period, shall be listed analogously as sums total.

(3) These obligations notwithstanding, credit institutions shall, as a minimum requirement, retain liquid resources of the first and second degree as set forth in paras 4 through 14. Unless this federal statute provides otherwise, the maturities mentioned shall be residual maturities. When determining the residual terms, in case of those categories of claims and liabilities where differing effective material terms exist, the expected residual periods may be used if their computation is effected pursuant to acknowledged statistical rules.

(4) For the assessment of liquid resources of the first degree, the following euro-liabilities shall be relevant:

1. demand deposits of credit institutions and deposits with the respective central institution with periods of notice or terms of less than 30 days, insofar as the latter serve the fulfillment of para 7;
2. deposits of physical and legal persons that are not credit institutions with periods of notice or terms of less than six months;
3. demand money, forward deposits and moneys borrowed from credit institutions with periods of notice or terms of less than six months, insofar as they are not offset by claims against credit institutions with terms or periods of notice of less than six months, excepting those which constitute liquid resources of the first degree at the respective central institution. Purchase obligations arising from sale and repurchase transactions with credit institutions with terms of less than six months and liabilities arising from

the issuance of money market certificates which become due within six months shall be treated in the same manner as forward deposits; obligations to sell arising from sale and repurchase transactions and claims arising from money market certificates which become due within six months shall be treated in the same manner as claims. Money market certificates are credit institution bonds which may only be traded between those credit institutions which have committed themselves to selling such certificates only to credit institutions;

4. liabilities arising from sale and repurchase transactions with physical and legal persons that are not credit institutions with periods of notice or terms of less than six months; and
5. liabilities arising from the acceptance of drafts and from the issuance of promissory notes.

(5) The following shall be excepted from the euro liabilities set forth in para 4:

1. liabilities arising from the refinancing of transmitted loans to the extent that the refinancing is effected on schedule;
2. liabilities arising from the refinancing of credits pursuant to the Export Promotion Act to the extent that the refinancing is effected on schedule;
3. liabilities to the Oesterreichische Nationalbank and to the European Central Bank;
4. liabilities arising from savings deposits of wards' money;
5. housing construction savings deposits; and
6. liabilities arising from own issuings, for which special cover assets have been set aside.

(6) The following shall be deemed liquid resources of the first degree:

1. cash in hand;
2. holdings of freely convertible foreign currency;
3. coined precious metals and bullion;
4. balances with the Oesterreichische Nationalbank;

4a. balances with the European Central Bank and other national central banks of the Member States participating in stage three of the Economic and Monetary Union, to the extent these balances serve the purpose of fulfilling the minimum reserve obligation;

5. (*Repealed by federal statute BGBl I No 25/2000.)*
6. euro sight deposits with the respective central institution as well as euro balances with the respective central institution with periods of notice or terms of less than 30 days.
7. the minimum reserve held by a credit institution directly or by a superordinate institution of a group of credit institutions (§ 30).

(7) Liquid resources of the first degree shall be held on a calendar average. The average amount is arrived at by taking the arithmetic means of the daily standings of the obligations as set forth in No 1 below on the last day of the penultimate month as well as on the seventh, fifteenth and twenty-third day of the preceding month and, as set forth in No 2 below, on the last day of

the preceding month as well as on the seventh, fifteenth and twenty-third day of the current month or, as the case may be, the last business day preceding such date. The following percentages are to be used:

1. 50% of the deposits with central institutions to the extent that these deposits are necessary to fulfill the liquidity requirement of the first degree of another credit institution. The FMA may by regulation change the percentage by such amount as appears necessary at the time to maintain the protection of creditors;
2. 10% of the remaining liabilities listed in para 4; the FMA may by regulation alter this percentage within a range of 0% to 20% to the extent this appears necessary at the time to maintain the protection of creditors and the readiness to pay*);
3. in issuing the regulations pursuant to Nos 1 and 2, consideration shall be given to the national economic interest in a functioning banking system and to sector-specific circumstances.

(8) For the assessment of liquid resources of the second degree, the following euro liabilities shall be relevant:

1. liabilities as set forth in para 4;
2. forward deposits and money borrowed from credit institutions with periods of notice or terms from six months to less than 36 months to the extent that they are not offset by claims against credit institutions with periods of notice or terms from six months to less than 36 months; para 4 No 3 shall apply analogously;
3. deposits of physical and legal persons that are not credit institutions, with periods of notice or terms from six months to less than 36 months;
4. own euro issuings with periods of notice or terms of less than 36 months; and
5. liabilities arising from sale and repurchase transactions with physical and legal persons that are not credit institutions, with terms from six months to 36 months.

(9) The following shall be excepted from the euro liabilities pursuant to para 8:

1. liabilities arising from own issuings for which specific cover assets have been set aside;
2. liabilities arising from refinancing of transmitted loans, insofar as the refinancing is effected on schedule;
3. liabilities arising from refinancing of credits pursuant to the Export Promotion Act;
4. liabilities to the Oesterreichische Nationalbank and to the European Central Bank;
5. liabilities arising from savings deposits of wards' money; and
6. housing construction savings deposits.

*) *See* the Fourth Regulation on Liquidity, BGBl II No 14/1999.

(10) The following euro asset items shall be deemed liquid resources of the second degree:

1. checks;
2. bonds due;
3. due interest coupons, profit participation coupons and dividend coupons;
4. fixed income securities which are admitted to official listing on an Austrian Stock Exchange, fixed income securities of issuers having their corporate seat in a Member State that may be traded in the regulated market or the third market of an Austrian Stock Exchange or that are admitted to a regulated market of a Member State (Art 16 of Directive 93/22/EEC), and bills of exchange rediscountable with the Oesterreichische Nationalbank;
5. demand moneys and forward deposits with credit institutions subject to periods of notice or terms of less than six months to the extent that they are not offset by liabilities to credit institutions with terms of less than six months and to the extent that they are not counted towards liquid resources of the first degree; for credit institutions affiliated with a central institution which are not permitted to terminate such affiliation pursuant to para 13, forward deposits with periods of notice or terms from 30 days to less than six months shall be deemed liquid resources of the second degree only if they are held at the respective central institution; para 4 No 3 shall apply analogously;
6. bonds issued by banks members of the European System of Central Banks;
7. the amount by which the average liquidity of the first degree exceeds the liquidity required pursuant to para 7;
8. federal treasury bills issued by the Federal Minister of Finance as authorized by the respective Federal Finance Act that are not liquid resources of the first degree pursuant to para 4 and whose term lasts from six to 36 months;
9. joint ownership shares within the meaning of the Investment Funds Act in the amount of the redemption price, if:
   a) the capital investment fund is exclusively formed of liquid funds pursuant to para 6 Nos 1 through 8 and derivatives (§ 21 Investment Funds Act 1993) are exclusively used to hedge the fund's assets;
   b) upon request of the shareholder, his share shall be repaid out of the capital investment fund within 30 days upon return of the share certificate, the revenue certificates and the renewal coupon;
   c) the composition of the capital investment fund pursuant to lit a and the obligation to redeem the share certificate pursuant to lit b have been published in the Official Gazette attached to the *Wiener Zeitung* and notified to the FMA and to the Oesterreichische Nationalbank;
   d) no publication pursuant to lit e has taken place; and
   e) the intended change in one of the requirements mentioned in lit a and b shall be communicated by the capital investment company to the Federal Minister of Finance and the Oesterreichische Nationalbank at

least six months in advance, and shall be published in the Official Gazette attached to the *Wiener Zeitung.*

(11) The following shall not be included in the liquid resources of the second degree within the meaning of para 10:

1. securities from own issuings;
2. securities which serve as cover or as substitute cover;
3. asset items pledged as security to third parties, with the exception of the Oesterreichische Nationalbank and the European Central Bank;
4. asset items pledged as security to the Oesterreichische Nationalbank and to the European Central Bank, insofar as no obligatory right of the pledgor to recovery exists;
5. securities which have been sold under a sale and repurchase transaction, and which are included in the balance sheet of the transferor pursuant to § 50 paras 1 and 2;
6. securities which have been bought under a sale and repurchase transaction; and
7. deposits which serve the refinancing of credits to the extent that these have been excepted from the obligations pursuant to para 4 at the refinanced bank.

(12) Liquid resources of the second degree shall be determined as of the last of each month. The required amount shall be at least 25% of the level of liabilities as set forth in para 10 on the fifteenth day of the same calendar month or, as the case may be, the last business day preceding such date. The FMA may by regulation alter this percentage within a range from 10% to 30% if this should prove necessary under the circumstances of monetary and credit policy in order to maintain readiness to pay. For liabilities under para 4 the percentage shall be reduced by the rate set by para 7 No 2 for liquid resources of the first degree.

(13) Credit institutions affiliated with a central institution shall hold a liquidity reserve at their central institution in the amount of 10% of the savings deposits and 20% of other euro deposits, but no more than 14% of their total euro deposits. Its amount shall be determined as of the end of the months of March, June, September, and December according to the level of deposits and shall be adjusted for the following quarter-year, respectively. If the deposits decrease by more than 20% below the level of the latest assessment basis, the credit institution may request an adjustment as of the last day of the following month. This liquidity reserve shall be counted towards the liquid resources of the first degree. Other deposits are moneys of payment transactions due daily (demand deposits), all deposits at notice and time deposits, as well as deposits for which deposit certificates have been issued. The provisions of this paragraph shall not apply to a credit institution which as of March 1, 1979 had a balance sheet total amounting to at least 40% of the balance sheet total of the central institution (excluding the building construction savings and loan business), if the credit institution gives notice to the central institution that it will cancel the affiliation with the central institution at the end of three years calculated from the time such notice is given. From the day

of receipt of the written notice by which such credit institution cancels its affiliation with the central institution, the legal obligation of this credit institution to adjust, on a quarterly basis, the extent of the liquidity reserve, shall expire. From this point in time onwards, the liquidity reserve may be gradually reduced. After expiration of the three year period the affiliation with the central institution may be maintained by continuing to hold with the central institution a liquidity reserve up to the amount of the liquidity reserve still in existence at this point in time, whose respective amount shall be communicated by the central institution to the Oesterreichische Nationalbank on a monthly basis.

(14) The FMA may, by regulation, supplement the liquid resources of the first and second degree set forth in paras 6 and 10 by other values of equal liquidity. In so doing, account shall be taken of the national economic interest in a functioning banking system.*)

### Open Foreign Exchange Positions and Gold

**§ 26.** (1) If the credit institution's or group of credit institutions' overall currency provision calculated pursuant to paras 3 and 4 (sum of the net total amount of the foreign exchange positions and of the net gold position) exceeds 2% of the own funds to be taken into account (immateriality threshold), the capital requirement for the foreign exchange risk amounts to 8% of the overall currency position (standard approach).

(2) When calculating the capital requirement, credit institutions and groups of credit institutions may, contrary to para 1, also chose the following approach, provided that it is applied in a consistent and sustained manner:

1. the capital requirement for the overall net currency position after deducting matched positions in currencies proven to be closely correlated amounts to 8%;
2. the capital requirement for the matched position in closely correlated currencies amounts to 4%.

Two currencies are deemed to be proven to be closely correlated if the probability that a loss occurring on equal and opposite positions in such currencies over the following 10 working days would not exceed 4% of the value of the matched position, expressed in euro, appears to be at least 99% if calculated on the basis of daily exchange rate data for the preceding three years. The allowance of 2% of the own funds to be taken into account pursuant to para 1 and the free amount pursuant to § 103 No 18a shall not apply when the alternative approach is chosen.

(3) The net amount of the open foreign exchange positions in each currency and in gold shall be calculated by summing up the following positions (positive or negative):

1. the net spot position, i.e. all asset items less all liability items, including interest accrued but not yet due, in the respective currency as well as the net spot position in gold; asset items that have been deducted from proper

*) *See* Regulation on Liquidity, BGBl No 771/1993.

own funds pursuant to § 23 para 13 Nos 3 and 4, as well as participations and shares in connected companies in foreign currencies, valued as asset items, up to an amount of 2%, may be excluded form the calculation of the credit institution's (group of credit institutions') own funds to be taken into account; the FMA may permit to exceed the limit of 2% to the extent this is justifiable despite the currency risk;

2. the net forward position, i. e. all amounts to be received less all amounts to be paid under forward exchange and gold transactions, including currency and gold futures and the principal on currency swaps not included in the spot position;
3. guarantees, irrevocable promises and similar instruments that will be called with high probability and that in all likelihood will not be honored; the recourse claim against the first debtor may, to the extent it is in the same currency, be shown as counter position with its actual value;
4. at the discretion of the credit institution, the net future income and expenditures not yet accrued but already fully hedged by forward foreign exchange or similar transactions; if this discretion is exercised, it must be applied on a consistent basis and in uniformity as to each foreign currency;
5. the net delta equivalent of the total book of foreign exchange and gold options; credit institutions may, in order to safeguard against the other risks associated with options (gamma and vega risk) apply recognized procedures and take those into account when assessing the foreign exchange risk. The applied option valuation models shall be notified to the FMA and to the Oesterreichische Nationalbank with a detailed and exhaustive description; the FMA may, by way of regulation, establish simplified procedures of calculating these risks;
6. the market value of options not covered by No 5;

Any positions with respect to which the existence of a certain exchange rate between the euro and another currency (exchange rate risk) is not guaranteed by the Federation shall be excluded form the calculation pursuant to Nos 1 through 6. When calculating the net open position in each currency and in gold, the present net market value may also be used.

(4) The net short and long positions in each currency and in gold shall be converted at average spot rates into euro. The short and long positions other than the positions in euro shall then be summed separately to form the total of the net short positions and the total of the net long positions, respectively. The higher of these two totals shall be the credit institution's overall net foreign exchange and gold positions.

(5) Consolidation of the open foreign exchange and gold positions shall be effected as follows:

1. those institutions of the group of credit institutions shall be included in the extent of consolidation with respect to which, following deduction of the immateriality threshold pursuant to para 1, calculated on a solo basis, an overall net currency position remains; the provisions of this federal statute shall apply by analogy to group member institutions having their seat abroad;

2. group member institutions that are not included in No 1 may be included into the consolidation, if this is done on a regular basis;
3. the foreign exchange and gold positions of group member institutions having their seat in a Member State may be summed according to each currency with respect to their sign;
4. if the conditions of § 22c No 4 are met, foreign exchange and gold positions of group member institutions having their seat in a third country may also be summed with respect to their sign;
5. the immateriality threshold pursuant to para 1 and the free amount pursuant to § 103 No 18a shall be taken into account only with respect to the consolidated assessment basis;
6. the superordinate credit institution shall set up within the group of credit institutions systems to monitor and control foreign exchange and gold positions, which shall also embrace those institutions whose foreign exchange and gold positions are not consolidated.

### Open Term Positions

**§ 26a.** (1) Credit institutions shall limit open term positions in the manner set forth in paras 2 through 6. In the case of credit institutions that do not apply § 22b para 2, this applies to term positions not included in the trading book.

(2) The sum total of the net open term positions in individual foreign currencies which become due within each quarter of the calendar year may not, at the end of any business day, exceed 50% of the own funds to be taken into account; excepted are the current and the two immediately following quarters of the calendar year.

(3) The sum total of the net open term positions in individual foreign currencies which become due within each half of the calendar year may not, at the end of any business day, exceed 50% of the own funds to be taken into account; excepted are the current and the immediately following half of the calendar year.

(4) The percentage rates set forth in paras 2 and 3 may, however, be exceeded in so far as this may from an economic point of view be considered as the closing of an open position. If a credit institution avails itself of this possibility, its books shall show to which position the closing relates. The FMA may, by way of regulation, reduce the rates referred to in paras 2 and 3 by a maximum of 10 percentage points if by virtue of developments of foreign exchange markets risks arise which have not been taken into account in these provisions. Paras 1 through 3 shall apply only to the extent that the existence of a certain exchange rate between Schillings and another currency (exchange rate risk) is not guaranteed by the Federation.

(5) When calculating the overall net open position pursuant to paras 2 and 3, the following shall apply:

1. positions of the credit institution in each individual foreign currency shall be calculated pursuant to § 26 para 2;
2. the conversion of the currencies shall be effected pursuant to § 26 para 3;

3. in the case of interest rate adjustment clauses, the date of the next interest rate adjustment shall be deemed the due date;
4. in the case of options, the interest adjustment dates of the underlying interest shall apply;
5. equities and financial instruments derived from equities shall be disregarded.

(6) Paras 2 through 5 shall not apply to branch offices of Austrian credit institutions abroad insofar as currencies are concerned which are legal tender at the location of their corporate seat. This provision, however, shall only be applicable if the FMA has, upon application by the credit institution, determined that the branch office is subject to supervision comparable to the one provided under this federal statute.

**Internal Models for the Limitation of Market Risks**

**§ 26b.** (1) Credit institutions that do not apply § 22b para 2 may also calculate the own funds requirement for

1. the specific and the general position risk in interest based instruments (§ 22g and § 22h),
2. the specific and the general position risk in equities (§ 22i and § 22j),
3. the commodities risk (§ 22p) and
4. the foreign exchange and gold positions risk (§ 26)

according to a model chosen by the credit institution that determines values at risk, provided that it does so regularly and the calculation is performed daily.

(2) The own funds requirement pursuant to the model is expressed as the higher of the two amounts stated in Nos 1 and 2, increased by a surcharge for the specific position risk:

1. the previous day's value at risk;
2. the arithmetic mean of the daily values at risk of the preceding sixty business days, multiplied by a factor not exceeding the value 5 and to be set by the FMA for each credit institution at no lower than 3; when setting the factor, the FMA shall take into account backtesting results of the model used by the credit institution as well as the extent to which the conditions set forth in para 3 Nos 1 through 4 are met.

If a combination of models and the standard procedures is used, the respectively calculated own funds shall be summed up.

(3) The calculation of the own funds requirement pursuant to a model chosen by the credit institution requires the special approval of the FMA. If a credit institution intends to use such a model, it must have an independent expert opinion on the market requirements, their description in the structure of the model and the requirements listed in para 5 No 2. In the approval procedure, the FMA shall seek an expert opinion from the Oesterreichische Nationalbank on whether the requirements set forth in Nos 1 through 4 are met, on the independence of the expert appointed by the credit institution

and on the size of the factor referred to in para 2 No 2. Approval shall be issued if:

1. the model is adequately integrated into the credit institution's risk management system,
2. the requirements set forth in para 5 Nos 1 through 3 are met,
3. the credit institution has staff sufficiently knowledgeable and skilled in the use of the model in the departments of trading, risk control, internal audit and back office,
4. the forecast quality of the model is proven to be confirmed by backtesting.

(4) If the credit institution or the superordinate credit institution is conducting material trading activities in multiple states through branches or group member institutions, the FMA shall inform the competent authorities of the intended use of the model selected by the credit institution and, if necessary, cooperate with these competent authorities. If institutions of a group of credit institutions, when consolidating the positions referred to in para 1, use models approved by a competent authority or a third country authority represented in the Basle Committee on Banking Supervision, the FMA shall limit the audit of these models to the integration into the group of credit institutions. To this effect, it may seek an expert opinion from the Oesterreichische Nationalbank. In case of doubt as to the adequate risk assessment, the procedure set forth in para 3 shall apply.

(5) The FMA shall by way of regulation set those criteria listed in Nos 1 through 8 that guarantee an adequate risk assessment by a model chosen by the credit institution*) A risk management shall be deemed adequate in any event, if those criteria correlate with the obligations of the Republic of Austria arising from its accession to the European Union and if these obligations are sufficiently detailed. If these obligations are not sufficiently detailed, risk management shall be deemed to be adequate, if the criteria meet the standard of international legal development as concerns the management of banking risks. The criteria shall encompass:

1. qualitative standards such as in particular:
   a) the organization and determination of responsibilities of a risk control unit that is independent from the business trading unit,
   b) the implementation of stress testing and backtesting and the reporting of their results to the FMA and to the Oesterreichische Nationalbank,
   c) involvement of management in the risk control process,
   d) the setting of limits for the persons and organizational units active in trading,
   e) the integration of the model into the risk management of the credit institution,
   f) documentation of the model,
   g) review of the model;

*) *See* the Regulation on Internal Models for the Limitation of Market Risks, BGBl II No 179/1997, as amended by Regulation BGBl II No 321/2000.

2. the specific market risk factors for the positions captured by the models (para 1);
3. quantitative standards such as in particular:
   a) the statistical probability level,
   b) the holding period of instruments in the case of price movements,
   c) the historical observation period of the data sets,
   d) the update of data sets,
   e) the correlations within and across the risk categories listed in para 1,
   f) the assessment of similar risks associated with options and similar positions;
4. the procedures for setting the multiplication factor referred to in para 2;
5. the procedures for conducting stress testing and backtesting;
6. the procedures for combining models and the standard methodology, if the model does not cover all positions referred to in para 1;
7. the admission criteria for the model for the calculation of the own funds requirement for the specific position risk;
8. the method to determine the surcharge for the specific position risk pursuant to para 2.

(6) Credit institutions shall

1. without delay report to the FMA and to the Oesterreichische Nationalbank changes in the model, the assumptions underlying the model and in the transactions included into the model, indicating whether those changes are material,
2. without delay report to the Federal Minister of Finance and to the Oesterreichische Nationalbank a discontinuation of the criteria listed in para 5 Nos 1 though 3;
3. communicate to the Federal Minister of Finance and to the Oesterreichische Nationalbank a system description of the model every three years.

(7) The FMA shall supervise the implementation of the model and revoke its authorization if:

1. despite fixing of the multiplication factor, the results of stress testing and back testing performed by the credit institution,
2. own audits or
3. results of audits performed by the Oesterreichische Nationalbank

show that an adequate risk assessment is no longer guaranteed. If a substantial change is notified pursuant to para 6 No 1, the procedure referred to in para 3 shall apply. If the risk assessment is accurate, the model used by the credit institution may be applied until a decision has been reached in the approval procedure. In the case of a notification pursuant to para 6 No 2, the FMA may set an adequate term for meeting the qualitative criteria.

### Large Exposures

**§ 27.** (1) Credit institutions and groups of credit institutions shall at all times appropriately limit the particular banking risk inherent in a large exposure. Credit institutions that do not apply § 22 b para 2 shall, in addition, take

into particular account the potential exposure arising from underwritings for securities.

(2) An exposure is considered to be large if the following items, calculated pursuant to Nos 1 through 4 exceed, with an individual client or a group of connected clients, 10% of the credit institution's own funds to be taken into account or of the group of credit institutions' consolidated own funds to be taken into account and amount to at least 500,000 euro. When calculating the large exposure, the following items shall be taken account of as follows:

1. the asset items referred to in § 22 para 3 with their book values after deducting value adjustments;
2. the off-balance sheet transactions pursuant to Annex 1 to § 22, weighted with 100%;
3. the special off-balance sheet financial transactions listed in Annex 2 to § 22, calculated according to one of the methods laid down in § 22 para 6, without application of the weighting for the counterparty risk;
4. the exposures which arise from the trading book with the values set forth in the following Nos a through e, if § 22b para 2 is not applied by the credit institution:
   a) the excess of the long positions over the short positions in all financial instruments issued by the client in question,
      aa) the net position in each of the different instruments being calculated according to the measures laid down in § 22d and § 22e,
      bb) stock-index futures broken down into positions in each of their constituent equities, if this option has also been exercised when calculating the position risk,
      cc) in the case of underwritings, the weighted net positions pursuant to § 22k may be applied, and
      dd) an excess of the long positions over the short positions is not nettable with other positions with the client;
   b) the settlement risk, weighted according to the measures laid down in § 221 No 1 or 2,
   c) free deliveries pursuant to § 22m, but without counterparty weighting,
   d) the sum of the positive excess amounts in the case of transactions pursuant to § 22n, but without counterparty weighting, and
   e) items pursuant to § 22o,
      aa) asset items and off-balance sheet transactions pursuant to Annex one to § 22 being weighted with 100%, and
      bb) special off-balance sheet financial transactions being valued according to one of the measures laid down in § 22 para 6, the counterparty weighting not being applied, however..

(2a) When calculating the large exposure, the following shall not be taken into account:

1. off-balance sheet financial transactions and special off-balance sheet financial transactions to the extent provisions have been formed;

2. asset items, off-balance sheet transactions and special off-balance sheet transactions referred to in para 2 Nos 1 through 3, provided that they are covered in para 2 No 4;
3. in the case of exchange transactions, loans that are extended in the ordinary course of settlement for a term of 48 hours after payment has been made;
4. in the case of securities transactions, loans that are extended in the ordinary course of settlement for a term of five working days after payment has been made or delivery of the securities has been effected, shall not be taken into account. The earlier maturity shall govern.

(2b) The exposures to a group of connected clients (para 4) shall be calculated by summing the exposures to individual clients in the group, as calculated in paras 2 and 2a.

(3) When applying para 7, the values computed according to para 2 shall be weighted with 100%, unless special weightings apply pursuant to the following Nos 1 through 4:

1. zero weighting:
   a) large exposures to the Federation, the States, the municipalities, Zone A central governments or central banks and to the European Communities; regarding the States and municipalities, the FMA shall inform the European Commission; large exposures to Member State regional governments may be weighted with 0% if the Member State concerned has provided for a weighting of 0% to apply to these claims according to Art 4 para 8 of Directive 92/121/EEC under its national law;
   b) large exposures explicitly guaranteed by the Federation, the States, the municipalities, Zone A central governments or central banks and the European Communities as well as by regional governments of a Member State, under the conditions set forth in lit a;
   c) large exposures, to the extent that they are secured by securities issued by the Federation, the States, the municipalities, Zone A central governments or central banks and the European Communities as well as by regional governments of a Member State, under the conditions set forth in lit a;
   d) large exposures to companies that belong to the same group of credit institutions as the lending institution;
   e) claims on the competent central institution and shares in this institution as well as off-balance sheet transactions and special off-balance sheet financial transactions that establish a credit risk vis-à-vis the competent central institution;
   f) large exposures adequately secured by collateral in the from of cash deposits placed with the lending institution or with a credit institution which is the parent company or a subsidiary of the lending institution;
   g) large exposures adequately secured by collateral in the from of certificates of deposit issued by the lending institution or by a credit institution which is the parent company or a subsidiary of the lending institution and deposited with either of them;

h) low risk off-balance sheet transactions pursuant to No 4 of Annex 1 to § 22, provided that an agreement has been concluded with the client (group of connected clients) concerned under which the exposure may be incurred only if it has been ascertained that it will not exceed the limits applicable under para 7;
i) bills of trade and other similar securities, with a maturity of one year or less, issued by a Zone A credit institution;
j) asset items, to the extent they are deducted from proper own funds according to § 23 para 13 Nos 3 or 4;
k) claims adequately secured by mortgages on residential property that is currently or will in the future be personally used or let by the borrower or will be transferred into the ownership of a third party for one of these purposes, excepting, however, professional room rental, up to 50% of the estimated value of residential property concerned; this estimated value shall be duly determined at least once a year; the aforementioned provisions shall also apply to leasing transactions under which the lessor retains full ownership of the residential property leased for as long as the lessee has not exercised his option to purchase;
l) fiduciary and transmitted loans, to the extent that the credit institution bears only the management risk;
m) mortgage bonds, municipal bonds and funded bank bonds;

2. 20% weighting:
   a) large exposures to Zone A credit institutions;
   b) large exposures to recognized investment firms;
   c) large exposures to recognized clearing houses;
   d) large exposures to recognized exchanges;
3. 50% weighting:
   a) large exposures to Member State regional governments, provided that a weighting of 0% cannot be applied, and to local territorial entities of a Member State;
   b) off-balance sheet transactions with below average credit risk pursuant to No 3 of Annex 1 to § 22 as well as off-balance sheet transactions pursuant to No 4 of Annex 1 to § 22, provided that they are not to be weighted with 0% according to No 1 lit h;
   c) large exposures to Zone B credit institutions;

(4) Group of connected clients shall mean:

1. natural or legal persons and other legal entities, one of which may exercise control insofar as one of the situations referred to in § 244 para 2 Nos 1 through 4 Commercial Code is met; if the lending credit institution is the company heading the group, each subsidiary and each subsidiary group shall be considered a separate group of connected clients, if no legal relationship exists between the respective subsidiaries and subsidiary groups. A legal relationship exists in particular if
   a) a subsidiary holds a participating interest exceeding 25% in a company which is the subsidiary of another subsidiary group or a direct subsidiary of the credit institution extending the loan; or

b) a subsidiary holds a participating interest exceeding 25% in a company in which a company of another subsidiary group or a direct subsidiary of the lending credit institution also holds a participation; or
c) one of the situations set out in § 30 para 1 Nos 2 through 7 applies to the relationship of a subsidiary and a company of another subsidiary group or a direct subsidiary of the lending credit institution,

and if the calculated acquisition costs of the participation exceed 5% of the openly disclosed consolidated own funds (the openly disclosed own funds) at one of the subsidiary groups concerned (subsidiaries that are not members of a subsidiary group of the superordinate credit institution);

2. natural and legal persons and other legal entities among whom no control relationship pursuant to No 1 exists, but with regard to which because of economic dependence repayment difficulties affecting one of these persons may impede the solvency of one or several of the other;
3. partnerships of commercial law and their personally liable partners;
4. trustor and trustee to the extent the latter acts for the account of the former; and
5. the obligor and his near relatives pursuant to § 80 para 3 Stock Exchange Act.

(4a) A group of connected clients also includes all those legal entities that are connected to a group member (para 4 Nos 1 through 3) through one of the definitional elements listed in para 4 Nos 1 through 3. This also applies to all other legal entities that are indirectly connected with a group member by virtue of one of the definitional elements listed in para 4 Nos 1 or 3. Para 4 shall not apply to large exposures with the Federation, the states and municipalities as well as with the central governments of Zones A and B.

(5) The large exposure may be treated as having been incurred by a third party if and to the extent that

1. the exposure is expressly, unconditionally and directly guaranteed by that third party, provided further that the result of an audit conducted by the credit institution is that the third party's credit standing is at least equivalent to that of the primary obligor, or
2. the large exposure is guaranteed by collateral in the form of securities issued by this third party that are regularly and effectively traded on a recognized securities exchange; the market value of these securities must exceed the value of the large exposure by 150% in the case of stock, by 100% in the case of other securities, by 50% in the case of bonds issued by Zone A credit institutions and regional governments other than those referred to in para 3 No 1 lit a, unless para 3 No 1 lit c applies. The securities may not be part of the credit institution's or group of credit institutions' own funds.

(6) The validity of the legal transaction notwithstanding, every large exposure computed according to para 2 shall require the express prior approval of the supervisory board or other supervisory body of the credit institution competent under statute or articles of association. The adoption of blank resolutions is not permitted. A report on every large exposure shall be made to

the supervisory board or other supervisory body of the credit institution competent under statute or articles of association at least once a year.

(7) The validity of the legal transaction notwithstanding, the value of a single large exposure may not exceed 25% of the credit institution's own funds and of the group of credit institutions' consolidated own funds to be taken into account. In the case of large exposures to the parent company or a subsidiary or a subsidiary of the parent company of the credit institution, this percentage shall be reduced to 20%. The sum total of all large exposures may not exceed 800% of the credit institution's own funds and of the group of credit institutions' consolidated own funds to be taken into account.

(8) If the large exposure computed according to para 2 exceeds 10% of the credit institution's own funds to be taken into account or if the sum amounts to at least 750,000 euro, the managers of the credit institution shall, prior to incurring this exposure to a client or a group of connected clients, request disclosure to them of the economic situation of the debtors and parties liable on the debt and shall, for the duration of the investment, remain sufficiently informed about the economic development of the debtors and parties liable on the debt and about the retention of value and enforceability of collateral, and they shall also demand regular submission to them of the annual financial statements. If the annual financial statements are not submitted, the managers of the credit institution shall in other ways acquire adequate information on the debtors and parties liable. The first two sentences shall not apply to:

1. large exposures pursuant to para 3 No 1 lit a;
2. balances with credit institutions;
3. fiduciary loans and transmitted loans, to the extent that the credit institution bears only the management risk; and to
4. asset items vis-à-vis institutions belonging to the same group of credit institutions pursuant to § 30.

(9) Credit institutions shall establish adequate administrative, accounting and control procedures for the purpose of recording the large exposures and subsequent changes to them as well as for monitoring these exposures in the light of the credit institution's exposure policy. The adequacy of these procedures and their enforcement shall be reviewed by the internal audit at least once a year.

(10) The FMA may, after hearing the Minister of Finance, by way of regulation amend the following provisions, if this should prove to be necessary because of amendments according to Art 7 para 1 of Directive 92/121/EEC:

1. the definition of large exposure, asset items, off-balance sheet transactions and special off-balance sheet financial transactions as well as the group of connected clients, to the extent the amendments are clarifications necessary to ensure the uniform application of Directive 91/121/EEC in the Member States or to take account of developments observed on the financial markets; and

2. the weighting of the asset items, the off-balance sheet transactions and the special off-balance sheet financial transactions pursuant to para 3, to the extent the amendments are clarifications or the weighting is thereby reduced.

(11) Paras 6 and 7 shall not apply to branch offices of Zone A foreign credit institutions, if all of the conditions listed in Nos 1 through 3 hereinafter are met:

1. the supervision of the large exposures of the Austrian branch is effected by the supervisory authority of the main seat of the credit institution;
2. the provisions on the limitation and supervision of large exposures in the state where the credit institution has its main seat are at least equivalent to the provisions of Directive 2000/12/EC; and
3. a branch of an Austrian credit institution would receive similar treatment in the host state concerned.

### Transactions with Affiliated Parties

**§ 28.** (1) A credit institution may, either directly or indirectly enter into legal transactions with:

1. its managers;
2. members of its managing board, insofar as it has the legal form of a cooperative;
3. members of its supervisory board or of other supervisory bodies competent under statute or articles of association;
4. its legal representatives and executives in its subordinated or superordinate companies;
5. spouses, companions in life within the meaning of § 72 para 2 Criminal Code, children, adopted and foster children of a person referred to in Nos 1 through 4, regarding No 4, however, of legal representatives only; and
6. third parties acting for the account of a person mentioned in Nos 1 through 5,

only upon a unanimous resolution by all managers and with the consent of the supervisory board or of other supervisory bodies competent under statute or articles of association. As far as resolutions on transactions with affiliated parties are concerned, the beneficiary shall have no right to vote on the resolution. In the case of loans, the resolutions shall also determine interest rate and repayment. In the case of employees of the credit institution, their spouses and minor children, the consent of the credit institution's supervisory board or other supervisory body competent under statute or articles of association is necessary for loans and advances only; No 6 shall apply.

(2) The following transactions are not subject to the provision of para 1:

1. loans and advances which in total do not exceed one quarter of the annual remuneration;

2. other legal transactions in which the adequate compensation does not exceed one quarter of the annual remuneration or amounts to less than 5,000 euro;
3. contracts for the performance of recurring obligations in which the adequate compensation, capitalized on a yearly basis, does not exceed one quarter of the annual remuneration;
4. every day banking transactions at conditions that are customary in the market.

(3) If a manager, an economic owner (§ 24 Federal Tax Act), a member of a managing body of the credit institution or one of this person's relatives referred to in para 1 No 5, is at the same time a manager, economic owner or member of a managing body of a company, legal transactions may be entered into with such company only with the approval of the supervisory board or other supervisory body of the credit institution competent under statute or articles of association.

(4) The approval pursuant to paras 1 and 3 of certain legal transactions or types of legal transactions may be granted for one year in advance. There shall be a duty to report to the supervisory board or other supervisory body competent under statute or articles of association on each of these legal transactions, loans and advances at least once a year. The reporting of legal transactions with executives within the meaning of para 1 No 4 or their employees pursuant to para 1 No 5 and of loans and advances to employees may be made in aggregated form; upon the request of a member of the supervisory body, however, information must be furnished on individual legal transactions, loans and advances.

(5) If legal transactions with affiliated parties are entered into in violation of the provisions set forth in paras 1, 3 and 4, the loans and advances extended shall, regardless of agreements to the contrary, be immediately repaid unless a unanimous resolution of the managers is subsequently adopted and approval is subsequently expressed by the supervisory board or other supervisory body competent under statute or articles of association. The managers and members of the supervisory body competent under statute or articles of association shall be personally liable jointly and severally for the repayment of the loans or advances if these were granted in violation of the provisions of paras 1, 3 and 4 with their knowledge and without their objection. If the credit institution should be damaged by other legal transactions entered into in violation of the provisions set forth in paras 1, 3 and 4, the aforementioned persons shall likewise be jointly and severally liable if they had knowledge of this fact and had not objected to the transaction being entered into, unless a unanimous resolution of the managers is subsequently adopted and approval is subsequently expressed by the supervisory board or other supervisory body competent under statute or articles of association.

### Participations

**§ 29.** (1) No credit institution or group of credit institutions may hold a qualifying participation the book value of which exceeds 15% of its own

funds to be taken into account or of its consolidated own funds to be taken into account in a company that is neither:

1. conducting for profit one or more of the businesses referred to in § 1 paras 1 or 2, nor
2. conducting an activity that is a direct extension of or an ancillary activity to a banking activity, nor
3. a contractual insurance company.

(2) The total book value of the qualifying participations in companies other than the ones referred to in para 1 Nos 1 through 3 may not exceed 60% of the credit institution's own funds to be taken into account or the group of credit institution's proper consolidated own funds to be taken into account.

(3) Stock or shares belonging to a credit institution or a group of credit institutions that are:

1. held only temporarily during a financial reconstruction or rescue operation;
2. held because of an underwriting obligation for securities during the normal course of such obligation;
3. held in the institution's own name, but for the account of others; or
4. not intended to permanently serve the business operation,

shall not be taken into account for the purpose of calculating the limits laid down in §§ 1 and 2.

(4) If the limits laid down in paras 1 and 2 are exceeded, the amounts by which a credit institution's qualifying participations exceed those limits must be covered by own funds to be taken into account. If both the limits laid down in para 1 and those in para 2 are exceeded, the amount to be covered by own funds shall be the greater of the two excess amounts.

## Chapter VI
## Group of Credit Institutions

**§ 30.** (1) A group of credit institutions exists if a superordinate institution (credit institution or financial holding company) having its corporate seat in Austria

1. maintains a direct or indirect majority holding;
2. holds the majority of voting rights of the shareholders;
3. has the right to appoint or recall the majority of the members of the administrative, managing or supervisory bodies;
4. has the right to exercise a controlling influence;
5. effectively exercises a controlling influence;
6. by virtue of an agreement with one or more shareholders of the subsidiary has the right to decide how shareholder voting rights, to the extent that these are needed together with the institution's own voting rights to reach a majority of all votes, shall be exercised in case of appointment or recall of the majority of the members of the managing or supervisory body; or

7. either directly or indirectly holds at least 20% of the voting rights or the capital of the subordinated institution and this participation is managed by a company belonging to the same group together with one or more companies not belonging to the group of credit institutions

with respect to one or more credit or financial institutions, investment firms or ancillary banking services companies (subordinated institutions) having their corporate seat in Austria or abroad.

Companies recognized as non-profit building associations and companies that are excluded on a permanent basis from the Directives applicable to credit institutions pursuant to Art 2 of Directive 77/780/EEC shall also be deemed financial institutions within the meaning of this provision. Member State central banks shall not be considered to be financial institutions.

(2) In addition to para 1, a group of credit institutions exists if a financial holding company has its corporate seat in another Member State and if:

1. at least one credit institution having its corporate seat in Austria is subordinated to this financial holding company (para 1 Nos 1 through 7);
2. no subordinated member of the group is a credit institution within the meaning of Art 1 first indent of Directive 77/780/EEC admitted in a Member State and having its corporate seat in the state of incorporation of the financial holding company; and
3. the credit institution situated in Austria has a higher annual balance sheet total than any other credit institution of the group admitted in a Member State within the meaning of Art 1 first indent of Directive 77/780/EEC; upon equality of balance sheet totals, the date of first admission shall be governing.

(3) Indirectly held participations shall be included only if they are held via a company in which the superordinate institution holds a participating interest of at least 20%. This provision shall apply analogously to indirectly held participations which are indirectly mediated by or held via more than one company. § 244 paras 4 and 5 Commercial Code shall apply with the proviso that there shall be a duty to consolidate in the cases of para 1 Nos 2 through 6 even in the absence of a participation.

(4) A group of credit institutions shall not exist with respect to the following superordinate institutions:

1. the credit institution situated in Austria is at the same time subordinated to another credit institution situated in Austria;
2. the financial holding company situated in Austria is at the same time subordinated to a credit institution situated in Austria or to a financial holding company situated in Austria;
3. the financial holding company situated in Austria is at the same time the subordinated institution of a credit institution admitted in a Member State within the meaning of Art 1 first indent of Directive 77/780/EEC.

(5) The superordinate credit institution of a group of credit institutions is the credit institution situated in Austria that is itself not subordinated to any other credit institution situated in Austria belonging to the group. If sev-

eral credit institutions qualify under this definition, the credit institution with the highest balance sheet total shall qualify as superordinate credit institution.

(6) The superordinate credit institution is responsible for compliance with the provisions of this federal statute that are applicable to the group of credit institutions.

(7) The institutions belonging to the group of credit institutions shall establish adequate internal control procedures and provide the superordinate credit institution with all data and information required for consolidation. They shall also give each other all information deemed necessary to ensure also for the group of credit institutions an appropriate risk limitation within the meaning of § 39. Furthermore, companies in which a credit institution holds a participating interest shall provide the information on those participations required to determine the superordinate credit institution's duty to consolidate in respect of indirect participations.

(8) The superordinate credit institution has to ensure that the subordinated institutions and a superordinate financial holding company communicate and provide all necessary information. If the superordinate financial holding company should fail to meet its information duty under para 7, the superordinate credit institution shall inform the FMA thereof. If upon acquisition of a participation subject to a duty to consolidate the transmission of the required information is not guaranteed, the superordinate institution may not acquire this participation.

(8 a) The connected companies with seat abroad supervised on a consolidated basis shall, upon request of the FMA, communicate to the latter all documents required for the consolidated supervision and provide the latter with all information to the extent this should be necessary for the fulfillment of the FMA's duties under this federal statute and be permitted under the laws of the foreign state.

(9) Subsidiaries situated in Austria subject to a duty to consolidate vis-à-vis financial holding companies, credit institutions, investment firms, financial institutions or mixed-activity companies as parent companies situated abroad shall provide all information and communicate to the parent institution all documents necessary for consolidation.

(10) Documents and information pursuant to paras 7 and 9 shall encompass the following areas of consolidation:

1. asset and liabilities items as well as positions of the profit and loss account;
2. off-balance sheet transactions;
3. special off-balance sheet financial transactions;
4. own funds;
5. large exposures including major loans;
6. qualifying participations pursuant to § 29;
7. annual financial statement including notes on the accounts and annual report;
8. register of large exposures and comparable facilities abroad;
9. foreign exchange positions; and

10. positions that are included in the consolidation of a price, liquidity, interest rate adjustment or securities risk.

## Chapter VII
## Savings Deposits

### Savings Documents

**§ 31.** (1) Savings deposits are deposits of money with credit institutions which serve investment purposes rather than payment transactions, and as such may only be accepted against issuance of particular documents (savings documents). Savings documents may be made out to a certain designation, in particular to the name of the customer identified pursuant to § 40 para 1; the use of names other than the one of the customer identified pursuant to § 40 para 1 is in any event prohibited.

(2) Savings documents may only be issued by credit institutions that are authorized to conduct the savings deposit business. Only such documents may be designated by the term *„Sparbuch“* (savings book), *„Sparbrief“* (savings certificate) or any combination of words including the component *„Spar“* (savings). The term *„Sparkassenbuch“* (savings bank book) shall remain exclusively reserved for savings documents issued by the credit institutions which are regular members of the trade association of savings banks. The issuance of savings documents with designations including the components *„Spar“* (savings) or *„Sparkasse“* (savings bank) in connection with the word *„Post“* (postal) shall remain exclusively reserved to the Österreichische Postsparkasse.

(3) Savings deposits that amount to less than 15,000 euro or the equivalent value in euro and that do not carry the name of the customer identified pursuant to § 40 para 1 must carry the reservation that disposals over the savings deposit may only be effected upon statement of a password designated by him. This reservation shall be noted in the savings document and in the records of the credit institution. If the reservation requires statement of a password, the party presenting the savings document shall state the password when making a disposal, or, if he is not able to do so, prove his ownership rights as to the savings deposit. § 40 para 1 No 4 shall remain unaffected. Disposal over a savings deposit acquired by succession upon death may be made without statement of the password; the same shall apply when a savings document is presented in the course of enforcement proceedings conducted by a court or an administrative agency.

(4) A credit institution which has received a report concerning the loss of a savings document as well as the name, occupation and address of the person incurring the loss, shall note the alleged loss in its records concerning the respective savings deposit and may not pay out any amounts from such savings deposit within four weeks after receipt of such report.

(5) After June 30, 2002, savings documents with respect to which an identification pursuant to § 40 para 1 has not yet occurred may not be transferred or acquired by legal transaction.

**Deposits to and Payments out of Savings Deposits and Interest**

**§ 32.** (1) Every deposit credited to a savings deposit and every payment out of a savings deposit shall be registered on the savings document.

(2) Payments out of savings deposits may only be made upon presentation of the savings document. Deposits to be credited to a savings deposit may also be accepted if the savings document is not simultaneously presented. At the following presentation of the savings document the acceptance of the payment shall be entered in it.

(3) It shall not be permissible to dispose over savings deposits either by means of transfer – except in those cases in which the person entitled to dispose over the savings deposit has died, is a minor or otherwise under tutelage and the court competent for probate, guardianship or tutelage matters has so directed – or by means of a check. However, a transfer into a savings deposit shall be permissible.

(4) Irrespective of a reservation pursuant to § 31 para 3 and notwithstanding § 40 para 1 No 4, the credit institution is entitled to make payment to any presenter of a savings document according to the following provisions set forth in Nos 1 through 3:

1. Savings deposits with a balance of less than 15,000 euro or the equivalent value in euro and that do not carry the name of the customer identified pursuant to § 40 para 1 may be paid out against disclosure of the password;

2. Savings deposits with a balance of at least 15,000 euro or the equivalent value in euro or that carry the name of the customer identified pursuant to § 40 para 1 may be paid out only to the customer identified pursuant to § 40 para 1;

3. Savings deposits that do not carry the name of the customer identified pursuant to § 40 para 1 and the balance of which, at the last presentation of the savings document, has reached or exceeded the amount of 15.000 euro or the equivalent value in euro exclusively because of an interest credit, may be paid out against disclosure of the password on the first presentation of the savings document following the reaching or exceeding of the above threshold. The threshold is reached or exceeded within the meaning of this section if, since the last presentation of the savings book, no funds have been transferred to the savings deposit which taken together would have led to the threshold being reached or exceeded.

Payment according to the aforementioned provisions may be made unless a report concerning the loss of the savings document, an administrative prohibition or an administrative blocking order impedes payment.

(5) Savings deposits shall – unless the savings deposit has been fully repaid within a year – be balanced at the end of the calendar year (balancing date). This shall not apply to savings certificates.

(6) The respective annual interest rate in effect for a savings deposit and the administrative charges that may be imposed for services in the context of savings deposits shall be clearly noted in the savings document in a conspicuous place. Each change in the annual interest rate shall be noted at the following presentation of the savings document, stating the day on which it has

become effective. The new annual interest rate shall apply from the date of effectiveness, without requiring the giving of notice on the part of the credit institution.

(7) The accrual of interest on savings deposits shall commence with the valuation date following receipt of cash (§ 37), each month being calculated with 30 days and the year with 360 days. Amounts which are withdrawn within 14 days of deposit shall not accrue interest, and payments out of deposit shall always be deemed to have been made out of amounts most recently paid in. In the case of payments out of savings deposits, interest for the amount paid out shall be computed up to and including the day prior to the paying out.

(8) Savings deposits may be bound for a specific period. Payments made prior to maturity shall be treated as advances and interest shall be charged accordingly. For such advances, 1‰ shall be charged per full month of non-compliance with the period of commitment. However, no more shall be charged in advance interest than interest has accrued, in total, on the paid-up amount, in which case interest already paid out in the preceding year shall be taken into account to the extent necessary if the interest payable on the current year is found to be insufficient. After June 30, 2002, maturity commitments may be agreed only if the identity has previously been established pursuant to § 40 para 1.

(9) Claims arising from savings deposits shall be subject to extinctive prescription in accordance with the general rules under the statute of limitations. Interest on savings deposits shall be subject to the same prescription period as deposits. The running of the statute of limitations shall be interrupted by every entry of interest into the savings document as well as by any deposit or paying-out.

## Chapter VIII
## Provisions Regarding Consumers
### Consumer Credit Agreements

**§ 33.** (1) Consumer credits are credits within the meaning of § 1 para 1 Nos 3 and 12 Consumer Protection Act extended to consumers within the meaning of § 1 para 1 No 2 Consumer Protection Act.

(2) The validity of the legal transaction notwithstanding, consumer credit agreements must be made in writing. Upon conclusion of a consumer credit agreement the credit institution must provide the consumer with a copy of the consumer credit agreement in German. If the prospective debtor so wishes, the credit institution must provide him with a draft of the agreement. The consumer credit agreement shall include at least the following information:

1. In the form of absolute numbers:
   a) the total burden pursuant to para 7;
   b) the sums of the cost items to be excepted pursuant to para 7 No 2 lit c and d; and
   c) the sum of the amounts to be quoted pursuant to lit a and b;

2. the effective annual interest rate in Arabic numerals in a conspicuous place in the contract;
3. a reference to the publication of the applicable fictitious annual interest rate for delay of payment pursuant to § 35 para 1 No 1 lit d;
4. if applicable, an interest adjustment clause, which must be linked to objective standards (§ 6 para 1 No 5 of the Consumer Protection Act remaining unaffected thereby);
5. the number, amounts and maturity of the installments in which the total burden is to be paid back; and
6. a reference to the savings component, if for the purpose of securing the loan an endowment insurance or an endowment and life insurance is to be entered into with the consumer credit agreement, and a reference in case the insurance sum is higher than the total credit burden or the term of insurance is longer than that of the credit.

(3) Para 2 first through third sentences, the contract contents set forth in para 2 Nos 1, 3 and 4 under the redemption assumptions of para 5, and the conditions for changes in the interest rate set forth in para 6 shall apply to a consumer credit agreement of revolving current account credits. The financial institution shall indicate the fictitious annual interest rate and compute it according to para 5. Revolving current account credits within the meaning of this provision are credits extended in an ongoing clearing, where the consumer may freely and repeatedly dispose of the credit amount or parts thereof within the agreed-upon term. The provisions of this paragraph shall not apply to:

1. delay of payment regarding consumer credits; and
2. overdraft of consumer current accounts.

(4) The effective annual interest rate is the annual, decreasing percentage that achieves numerical equality between the credit amount paid out and the total burden of the consumer. It expresses the borrowing costs pursuant to para 7 No 2 in relation to the credit amount paid out; it shall be computed by using the following financial-mathematical formula, and it shall be expressed as rounded to at least one decimal digit under application of usual commercial standards:

$$\sum_{x=1}^{n} \frac{Z_x}{(1+i)^{tx}} = \sum_{y=1}^{m} \frac{R_y}{(1+i)^{ty}}$$

$Z_x$ being the part of the credit amount under numbers 1 through n that is paid out to the consumer,
$t_x$ being the period expressed in years or parts of a year that lies between the date of payment of the first credit portion and the date of later payments $Z_2$ through $Z_n$, $t_1$ being 0,
i being the effective annual interest rate,
$R_y$ being the respective partial amount of the total burden to be paid back under numbers 1 through m, and
$t_y$ being the period expressed in years or parts of a year that lies between the date of payment of the credit amount $Z_1$ and the respective date of

repayment of the partial amounts $R_1$ through $R_n$. For $t_x$ and $t_y$ the year shall be computed with 365 days, in leap-years 366 days, 52 weeks and 12 months of equal length of 30,41666 days each. Instead of considering leap-years separately, the year may also be computed consistently with 365,25 days; a once chosen method has to be applied for at least four years.

(5) The fictitious annual interest rate is the annual, decreasing percentage that achieves numerical equality between the credit amount paid out – irrespective of the effective date of payment – and the total burden of the consumer. It expresses the borrowing costs pursuant to para 7 No 2 in relation to the available credit amount. For the purpose of this calculation it is to be assumed that the credit amount at the free disposition of the consumer has been fully taken advantage of and has been paid back in one installment one year after the first day of its availability. The fictitious annual interest rate shall be computed by using the following financial-mathematical formula, and it shall be expressed as rounded to one decimal digit under application of usual commercial standards:

$$Z = \frac{R}{1 + 1}$$

Z being the credit amount the consumer may dispose of,
R being the amount of the total burden to be paid back,
i being the fictitious annual interest rate.

(6) The credit institution shall inform the consumer in writing of any change in the effective annual interest rate pursuant to para 4 and in the fictitious annual interest rate pursuant to para 5 before the change is to take effect. This communication shall include information on the extent of the change, the date on which it is to take effect and the new interest rate. Regarding delay of payment by the consumer or overdraft of consumer current accounts, the credit institution may publish this information in the publication pursuant to § 35 para 1 No 1 before the change is to take effect, if the consumer has been simultaneously informed of this procedure in writing. Regarding consumer credits, in case of a change in the interest rate the amount of the installment shall in each case be adjusted in such manner that repayment is possible within the term initially agreed upon. A divergent agreement is permissible, if individually negotiated.

(7) The total burden is the sum of payments the credit institution requires from the consumer in connection with the extension of a credit. The following items form part of the total burden:

1. The paid-out credit amount, and
2. the borrowing costs with the exception of such costs as are incurred by the consumer because of:
   a) nonperformance of his obligations,
   b) transfer of the installments to be paid back, or administration of an account, insofar as these costs are not higher than those for consumer current accounts,

c) payment of public levies, and
d) insurance or security payments, insofar as they secure the repayment to the credit institution upon death, disablement, illness or unemployment of the consumer of an amount exceeding the total burden and insofar as such payment is not imposed by the credit institution as a necessary condition for the extension of the credit.

(8) The consumer is entitled to prematurely fulfill either entirely or partially his obligations arising from a consumer credit agreement. In this case, the credit institution shall reduce the total burden by the amount of interest and term dependent costs that does not accrue in case of a current account-wise settlement of the amount paid back prematurely. With the exception of the cases mentioned in Nos 1 and 2, agreements as to or charges of additional amounts for premature repayment are not permitted. Regarding premature repayment, a period of notice may be agreed upon amounting to

1. a maximum of six months in case of credits that have been demonstrably designated for the construction or restoration of buildings and have a term of at least ten years, as well as in the case of credits secured by a mortgage (§ 18 of the Mortgage Banks Act remaining unaffected), or
2. the fixed interest period agreed upon in case of credits pursuant to No 1.

(9) Within the first quarter of every year, the credit institution shall provide the consumer with an account statement as of December 31 of the preceding year which will contain at least the sum of the payments made, the sum of the charges as well as the balances due.

(10) In case of credits extended to consumers within the meaning of § 1 para 1 No 2 Consumer Protection Act in the context of issuance and administration of means of payment within the meaning of § 1 para 1 No 6 Consumer Protection Act, the credit institution extending the credit shall upon conclusion of the contract inform the consumer of the fictitious annual interest rate pursuant to § 33 para 5. Para 6 shall apply to any change in this interest rate.

### Consumer Current Account Agreements

**§ 34.** (1) Consumer current accounts are accounts of consumers within the meaning of § 1 para 1 No 2 Consumer Protection Act.

(2) § 33 para 2 first through third sentences shall apply to the conclusion of a contract for the keeping of an account within the meaning of para 1. The consumer current account agreement shall contain at least the following items:

1. the fees charged for account keeping and for the provision of services in connection with accounts within the meaning of para 1,
2. the annual interest rate for balances,
3. the terms for contract termination, and
4. reference to the publication of the applicable fictitious annual interest rate for overdrafts pursuant to § 35 para 1 No 1 lit d.

(3) After conclusion of a consumer credit agreement, the credit institution shall communicate the information within the meaning of para 2 No 1 to

the consumer at least once a year. It shall notify the latter of any change in the information provided pursuant to para 2 Nos 1 through 3 before such change goes into effect. An account statement is deemed sufficient for this purpose.

(4) The credit institution shall by way of account statement communicate to the consumer his account status at least on a quarter-year basis, and it shall draw his attention to the published fictitious annual overdraft interest rate within the meaning of § 35 para 1 No 1 lit d in case of an overdraft on his part that exceeds a period of three months.

### Price Display and Advertising

**§ 35.** (1) Credit institutions shall display the following in the cashier's hall:

1. Information on:
   a) interest rates on savings deposits,
   b) fees charged for the provision of services in connection with savings deposits and for other services in the area of private banking,
   c) the effective annual interest rate for consumer credits, if necessary by citing illustrative examples, and
   d) the fictitious annual interest rate pursuant to § 33 para 5, assuming the use of a disposable credit amount of 5,000 euro in the amounts of 50% and 100%, if necessary by way of illustrative examples, in case of
      aa) delay of payment pursuant to § 33 para 2 No 3 and
      bb) overdraft of consumer current accounts,

   as well as
2. the general business terms and conditions, and
3. the information on the guarantee scheme referred to in § 93 para 8 and para 8a.

(2) Every advertising of the willingness to extend credits shall – insofar as it includes figures on interest rates or borrowing costs – mention the real and fictitious annual interest rate, if necessary by giving illustrative examples.

### Business Relationships With Juveniles

**§ 36.** In their business relationships with juveniles (persons that have not yet completed their 18th year of age), credit institutions shall comply with the following duties of diligence:

1. The issuance of debit cards and checking cards to juveniles under the age of 18, or under the age of 17 in case of a regular income on their part, requires the express permission of their legal representatives;
2. receipt of cash by juveniles from automated teller machines shall be limited to 400 euro per week;
3. Nos 1 and 2 do not apply to cards that allow the retrieval of money at the issuing credit institution only, if the latter has the possibility to authorize the withdrawal on a case-by-case basis in case such withdrawal would result in an overdraft;

4. before issuing checks to juveniles the credit institution shall examine the orderliness of the account handling to date, in particular the current account status.

**Valuation**

**§ 37.** (1) In payment transactions with consumers within the meaning of § 1 para 1 No 2 Consumer Protection Act, credit institutions shall on the same day, but no later than

1. on the work day following the day of availability take account of amounts or
2. on the banking day following the day of availability forward amounts.

(2) Availability shall be given immediately upon receipt of:

1. the amount or
2. the payment order, taking into account any value orders.

## Chapter IX
## Banking Secrecy

**§ 38.** (1) Credit institutions, their shareholders, members of their organs, employees as well as other persons acting for credit institutions may not disclose or make use of secrets which have been entrusted or made accessible to them solely due to the business relationships with customers or pursuant to § 75 para 3 (banking secrecy). If facts that are subject to banking secrecy come to the attention of functionaries of the authorities or of the Oesterreichische Nationalbank in the course of their official activities, they shall keep such banking secret as an official secret from which they may only be released in the instances set forth in para 2. The obligation to maintain secrecy shall apply without time limit.

(2) The obligation to observe banking secrecy shall not exist:

1. vis-à-vis criminal courts in connection with initiated criminal court proceedings, and vis-à-vis the governmental authorities competent for the punishment of fiscal violations in connection with initiated penal proceedings for intentional fiscal violations, with the exception of fiscal misdemeanors;
2. in case of the duty of disclosure under § 41 paras 1 and 2, § 61 para 1, § 93 and § 93 a;
3. in case of death of the customer vis-à-vis the probate court and the court commissioner;
4. if the customer is a minor or otherwise under tutelage, vis-à-vis the guardianship or tutelage court;
5. if the customer expressly and in writing assents to the disclosure of the secret;
6. for generally worded information concerning the economic situation of a company, as is customary in the banking business, unless such company expressly objects to the granting of such information;

7. to the extent disclosure is necessary for the resolution of legal matters arising from the relationship between a credit institution and its customer;
8. as concerns the reporting obligation pursuant to § 25 para 1 of the Inheritance and Gift Tax Act; and
9. if a duty to inform the Austrian Securities Authority exists pursuant to the provisions of the Securities Supervision Act or the Stock Exchange Act.

(3) A credit institution may not lay claim to banking secrecy to the extent the disclosure of the secret is necessary to determine its own tax liability.

(4) The provisions of paras 1 through 3 shall also apply to financial institutions and contractual insurance companies with respect to § 75 para 3 and to guarantee schemes except for the cooperation required by § 93 to § 93 b with other guarantee schemes as well as deposit-guarantee schemes and investor compensation schemes.

(5) **(Provision in the rank of constitutional law)** Paras 1 through 4 may be amended by the National Council only in the presence of at least one-half of the deputies and with a majority of two-thirds of the votes cast.

## Chapter X
## Duty of Diligence and Money Laundering
### Duty of Diligence

**§ 39.** (1) In conducting their business, the managers of a credit institution shall apply the diligence of a prudent and conscientious manager within the meaning of § 84 para 1 of the Stock Corporation Act. In particular, they shall inform themselves about and appropriately limit the risks of banking transactions and of operating the bank and give consideration to parallel risks. They shall furthermore give consideration to the overall earnings situation of the credit institution. Regarding new transactions with respect to which there exists no experience as to the risks involved, due consideration shall be given to the security of third parties' moneys entrusted to the credit institution and the preservation of own funds, in particular when determining the scope of such transactions. Parallel risks shall mean all potential negative consequences that may result from concentrations or interplays of similar or different risk categories.

(2) Credit institutions shall establish such administrative, accounting and control procedures as are necessary for the purpose of recording and evaluating the risks of the credit institution's banking transactions and of operating the credit institution, and to record and evaluate as far as possible the potential risks resulting from new business and parallel risks. The adequacy of these procedures and their enforcement shall be reviewed by the internal audit at least once a year.

(3) Credit institutions and enterprises that conduct business within the meaning of § 1 para 2 on a commercial basis shall scrutinize with special care each transaction that in their opinion strongly suggests that it may be connected with money laundering (§§ 165 and 278 a para 2 Criminal Code).

(4) Credit institutions that do not apply § 22 b para 2 shall ensure that

1. the risk positions of the trading book may be calculated at any time;
2. when using internal models the documentation is such that it may be duplicated and may be challenged with test cases; and
3. control of the calculation of the risk positions of the trading book by the bank auditor and own auditors pursuant to § 70 para 1 No 3 is possible at any time.

### Money Laundering

**§ 40.** (1) Credit and financial institutions shall register the identity of a customer:

1. when entering into a permanent business relationship; savings deposit transactions pursuant to § 31 para 1 of this federal statute and transactions pursuant to § 12 Deposits Act are in any event permanent business relationships;
2. in all transactions not falling within the scope of an ongoing business relationship and involving a sum amounting to at least 15,000 euro or an equivalent value in euro, irrespective of whether the transaction is carried out in a single operation or in several operations which are obviously closely linked; if the sum is not known at the beginning of the transaction, the identity shall be registered as soon as the sum becomes known and it is established that it amounts to at least 15,000 euro or an equivalent value in euro;
3. if there is a substantiated reason to suspect that the customer (even unknowingly) participates in transactions connected with money laundering (§§ 165 – including assets that are the direct fruit of a criminal act of the offender – and 278 a para 2 Criminal Code);
4. after October 31, 2000, in the case of credits to savings deposits, and after June 30, 2002 also in the case of withdrawals from savings deposits, if the amount deposited or withdrawn amounts to at least 15,000 euro or an equivalent value in euro.

(2) Credit institutions and financial institutions shall request the customer to declare whether he intends to execute the business relationship (para 1 No 1) for his own or for someone else's account; the customer shall comply with that request. If the customer declares that he intends to conduct the business relationship (para 1 No 1) or the transaction (para 1 No 2) for someone else's account, he shall inform the credit or financial institution of the trustor's identity.

(3) The credit and financial institutions shall keep:

1. documents enabling an identification under paras 1 and 2 for a period of at least five years after the business relationship with that customer has ended;
2. supporting evidence and records of all transactions for a period of at least five years following the execution of these transactions.

(4) Credit and financial institutions shall:

1. establish adequate procedures of control and communication in order to forestall and prevent transactions serving the purpose of money laundering; and
2. take appropriate measures to familiarize the employees in charge of executing transactions with the provisions relating to the prevention or combating of money laundering; these measures shall, among others, include participation of the respective employees in special training programs to help them recognize operations which may be related to money laundering and to proceed correctly in such cases.

(5) The receipt and the acquisition of securities for

1. securities accounts (§ 11 Deposits Act) and
2. business relationships pursuant to § 12 Deposits Act

that have been opened respectively entered into prior to August 1, 1996 are permitted only if the customer's identity has been registered beforehand and para 2 has been complied with. After June 30, 2002, the sale of securities and the withdrawal of balances and proceeds of securities accounts (§ 11 Deposits Act) and out of business relationships pursuant to § 12 Deposits Act may be effected only if the customer's identity has been registered beforehand and para 2 has been complied with.

(6) Payments to or withdrawals from existing savings deposits pursuant to § 31 may not be made unless the identity has been registered pursuant to para 1. Likewise, no credits may be effected to such savings deposits, unless the identity has been registered pursuant to para 1. Until June 30, 2002, transfers from securities accounts and in connection with transactions pursuant to § 12 Deposits Act opened or entered into prior to August 1, 1996, are excepted herefrom.

(7) After June 30, 2002, savings accounts with respect to which an identity registration pursuant to para 1 has not yet occurred shall be managed as separately designated accounts. Payments to, withdrawals from and credits to such accounts may be effected only once an identity registration pursuant to para 1 has occurred.

**§ 41.** (1) If there is reasonable suspicion:

1. that a transaction which has already occurred, is in progress or is about to occur serves the purpose of money laundering, or
2. that a customer has violated his duty to disclose fiduciary relationships pursuant to § 40 para 2,

credit and financial institutions shall without delay inform the authority (§ 6 Security Police Act) thereof and shall, until the case has been solved, stop any further execution of the transaction unless there is a danger that a delay in the transaction would complicate or obstruct the investigation of the case. In case of doubt, orders on money credits to the account may be executed and orders on debits shall not be executed. The credit and financial institutions

may demand from the authority that it decide whether reservations exist with respect to the immediate execution of a transaction; if the authority (§ 6 Security Police Act) does not respond until the end of the following banking day, the transaction may be executed without delay.

(1a) The credit institutions shall without delay inform the authority (para 1) of all requests for paying out savings deposits if

1. the requests are made after June 30, 2002 and
2. no identity registration pursuant to § 40 para 1 has yet occurred and
3. payment is to be effected from a savings deposit whose balance amounts to at least 15,000 euro or the equivalent value in euro.

Payments from such accounts may occur only after the expiration of seven calendar days following a request for payment, unless the authority (para 1) has set a longer term pursuant to para 3.

(2) Credit and financial institutions shall, upon request, provide the authority (para 1) with all information which the latter deems necessary to prevent or prosecute money laundering.

(3) The authority (para 1) is empowered to order that a transaction already in progress or about to occur with respect to which there is reasonable suspicion that it serves the purpose of money laundering shall not be executed or shall be provisionally stayed and that money withdrawal orders of customers may be executed only with the consent of the authority. The authority shall inform the customer and the Prosecutor's Office of the order without undue delay. The information to the customer shall include the instruction that he or any other interested party is entitled to file a complaint concerning the violation of his rights with the Independent Administrative Panel. In this context, the authority shall also point out the provisions for such complaints contained in § 67c Administrative Procedure Act (AVG).

(3a) The authority shall lift the order pursuant to para 3, as soon as the prerequisites for its imposition no longer exist or the Prosecutor's Office declares that the prerequisites for imposing a provisional measure pursuant to § 144a Criminal Procedure Act (StPO) do not exist. In any event, the order shall lapse

1. six months after its imposition;
2. as soon as a court has made a final decision on a petition for imposition of a provisional measure pursuant to § 144a Criminal Procedure Act (StPO).

(4) The credit and financial institutions shall preserve secrecy vis-à-vis customers and third parties with respect to steps designed to implement paras 1 through 3. As soon as an order pursuant to para 3 has been issued, they are, however, authorized to refer the customer to the authority (para 1); with the approval of the authority they may furthermore themselves inform the customer of the order.

(5) If the FMA or the Oesterreichische Nationalbank should, in the process of their bank supervision activities, have reasonable suspicion that a transaction serves the purpose of money laundering, they shall without delay inform the authority (para 1) thereof.

(6) Under threat of nullity, the following may not be used to the accused's or the affected third party's detriment:

1. data that are the product of an investigation conducted by the authority pursuant to paras 1, 2 or 5, in a proceeding conducted exclusively on the basis of a tax misdemeanor, with the exception of the tax misdemeanors smuggling and evasion of incoming or outgoing levies falling within the jurisdiction of the courts;
2. data that are the product of an investigation conducted by the authority pursuant to para 1 a, in a proceeding conducted exclusively on the basis of a tax misdemeanor pursuant to No 1 or because of another criminal act threatened with no more than one year of imprisonment.

Should the authority (para 1) merely suspect a criminal act pursuant to Nos 1 or 2, it shall refrain from reporting it pursuant to § 84 Code of Criminal Procedure or § 81 Fiscal Penalties Act.

(7) Liability claims may not be based on the fact that a credit or financial institution or an employee of such institution was, through its or his negligence, unaware of the fact that the suspicion of money laundering or the suspicion of a violation within the meaning of § 40 para 2 was unfounded and failed to execute or only belatedly executed a transaction.

(8) The FMA shall, insofar as this should be necessary to ensure compliance with the reporting duty pursuant to para 1, by regulation name an agency whose function is to advise the credit and financial institutions on the implementation of this duty. The following provisions shall apply:

1. credit institutions shall not be bound by the banking secrecy (§ 38) vis-à-vis this agency;
2. the agency and its employees shall treat secrets that have become known to them in the course of their activities as banking secrets;
3. the obligation to respect banking secrecy pursuant to No 2 shall not exist vis-à-vis criminal courts in connection with initiated criminal proceedings with the exception of the proceedings listed in para 6; § 38 para 7*) shall not apply; and
4. misconduct of the agency and its employees in the performance of their counseling activity vis-à-vis credit and financial institutions shall give rise to liability only in case of gross negligence.

## Chapter XI
## Internal Audit

**§ 42.** (1) Credit institutions shall establish an internal audit which shall be immediately subordinate to the managers and shall exclusively serve the

*) As corrected by BGBl No 639/1993.

purpose of current and comprehensive review of the legality, propriety and expedience of the entire enterprise. The internal audit must be established in such a manner that, taking into consideration the volume of the business, it can fully comply with its duties. Persons with respect to whom grounds for disqualification exist may not be entrusted with tasks of internal audit.

(2) Grounds for disqualification are circumstances that would suggest that proper compliance with the tasks of internal audit appears to be unlikely. Grounds for disqualification exist in particular if:

1. the persons concerned lack the necessary expertise and experience in the banking field, and
2. the persons concerned are at the same time appointed as bank auditors at the same credit institution.

(3) Directives concerning the internal audit shall be issued by at least two managers acting jointly. The internal audit shall make its reports to all managers. On a quarterly basis, it shall also report material audit results based on audits performed to the president of the supervisory board or to the competent supervisory body of the credit institution.

(4) The internal audit shall also review

1. the factual accuracy and completeness of notifications and reports to the FMA and to the Oesterreichische Nationalbank;
2. the correct inclusion of positions in the trading book as well as any transfers according to internal criteria applicable to their inclusion in the trading book;
3. compliance with § 40 para 4 No 1; and
4. in the case of credit institutions that do not apply § 22 b No 2,
   a) the manner in which qualifying items are assessed;
   b) the methods of valuation to determine the market price pursuant to § 22 a No 2;
   c) the model used for valuing options, in particular the determination of the volatilities and of the other parameters for determining the delta pursuant to § 22 e para 3;
   d) the calculation of the other risks associated with options pursuant to § 22 e para 4.

(5) The internal audit shall draw up a yearly review schedule and perform its examinations according to that schedule. It shall furthermore perform unscheduled examinations on a case-by-case basis.

(6) In case of credit institutions whose balance sheet total exceeds 110 million euro and that, on an annual average, have more then 30 full-time employees, a separate organizational unit shall be charged with the tasks of internal audit.

(7) In case of groups of credit institutions the internal audit of the superordinate credit institution shall fulfill the tasks of the internal group control.

## Chapter XII
## Accounting

### General Provisions

**§ 43.** (1) The managers shall ensure the legality of the annual financial statements and consolidated financial statements as well as of the annual reports and consolidated annual reports of the credit institutions. The provisions of Book III of the Commercial Code, with the exception of §§ 207 para 2 last sentence, 223 para 6, 224, 226 para 5, 227, 231, 232 para 5, 237 Nos 1, 3, 4 and 9, 242, 244 para 6, 246, 248, 249 para 1, 266 Nos 1 and 3, 275 para 2, 278, 279 and 280a shall apply to the annual financial statements, the consolidated financial statements, the annual reports, the consolidated annual reports and to their audit and disclosure.

(2) The balance sheets and the profit and loss accounts of all credit institutions, with the exception of housing construction savings and loan associations, shall be issued according to the layout provided in the forms included in the Annex.*) The consolidated financial statement shall likewise be drawn up according to the layout of these forms. The annual financial statements and consolidated financial statements shall be drawn up in such timely manner that the time limit provided in § 44 para 1 is met. A further itemization of the forms is permitted only in those instances where it is necessary to avoid misunderstandings or where required by other legal provisions. The FMA may by way of regulation alter the forms if amended accounting rules so require.

(3) Credit institutions in Austrian duty-free zones shall, in deviance from § 193 para 4 Commercial Code, draw up the annual financial statement in German Marks or in euro.

**§ 44.** (1) Credit institutions and branch offices of foreign credit institutions shall no later than six months after the end of the business year communicate to the FMA and to the Oesterreichische Nationalbank the audited annual financial statements, annual reports, consolidated financial statements and consolidated annual reports pursuant to § 59 and § 59a para 1 as well as the audit reports on the annual financial statements, annual reports, consolidated annual financial statements and consolidated annual reports pursuant to § 59 and § 59a para 1. The credit institutions shall furthermore communicate to the FMA and to the Oesterreichische Nationalbank no later than six months after the end of the business year the data of the annual financial statements and consolidated financial statements pursuant to § 59 and § 59a para 1 in standardized form on electronic data storage devices.

(2) Branch offices of foreign credit institutions shall furthermore communicate to the FMA and to the Oesterreichische Nationalbank within six months after the end of the business year the annual financial statements of the foreign credit institutions.

*) See infra pp. 191 et seq.

(3) Branch offices of credit institutions as defined in § 9 para 1 and financial institutions as defined in § 11 para 1 and § 13 para 1 that conduct business in Austria pursuant to § 1 para 1 Nos 2 through 8, 11 and 15 through 17 shall transmit to the FMA and to the Oesterreichische Nationalbank no later than six months following the closing of the business year the annual financial statement and annual report, if applicable the consolidated annual financial statement and annual report of the credit or financial institution.

(4) Branch offices of credit institutions as defined in § 9 para 1 and financial institutions as defined in § 11 para 1 and § 13 para 1 that conduct business in Austria pursuant to § 1 para 1 Nos 2 through 8, 11 and 15 through 17 are obligated to have the following information set forth in Nos 1 through 4 verified by bank auditors and to transmit to the FMA and to the Oesterreichische Nationalbank no later than six months following the closing of the business year:

1. the income and costs of the branch office deriving from items 1, 3, 4, 6, 7, 8 and 18 of Annex 2 to § 43, part 2;
2. the average number of staff employed by the branch office;
3. *(Repealed by federal statute BGBl I No 126/1998);*
4. the total assets and amounts to be attributed to the branch office, corresponding to items 2 through 6 of the Assets items, 1, 2 and 3 of the Liabilities items, and 1 and 2 of the off-balance sheet items defined in Annex 2 to § 43, part 1, and, in the case of Assets items 2, 5 and 6 defined in that Annex, a breakdown of securities according to whether they are regarded as financial fixed assets.

(5) Branch offices of Member State credit institutions and Member State financial institutions in Austria shall furthermore transmit the verified data referred to in para 4 in standardized form on electronic data storage devices to the FMA and to the Oesterreichische Nationalbank no later than six months following the closing of the business year.

(5 a) The compliance of branches of investment firms pursuant to § 9 a with §§ 10 through 18 of the Securities Supervision Act shall be reviewed by bank auditors. An audit report pursuant to § 63 para 6 a shall be drawn up on the audit result. This report as well as any possible remarks of the bank auditor pursuant to Part II of the banking supervisory audit report relating thereto shall be communicated by the branches of the foreign credit institutions to the FMA within six months following the close of the business year.

(6) The information pursuant to paras 2, 4, 5 and 5 a shall be given in German.

### General Provisions on Drawing up the Balance Sheet

**§ 45.** (1) The following sub-items shall be shown separately within the respective items:

1. claims, whether or not evidenced by certificates, against affiliated enterprises and included in Assets items 2 through 5;

2. claims, whether or not evidenced by certificates, against enterprises with which a holding relationship exists and included in Assets items 2 through 5;
3. liabilities, whether or not evidenced by certificates, to affiliated enterprises and included in Liabilities items 1, 2, 3 and 7; and
4. liabilities, whether or not evidenced by certificates, to enterprises with whom a holding relationship exists and included in Assets items 1, 2, 3 and 7.

(2) Subordinated assets shall be shown separately as sub-items of the Assets items and of the sub-items referred to in para 1.

(3) Information pursuant to paras 1 and 2 may also be shown separately in the notes on the accounts in the order of the respective items.

(4) Assets, whether or not evidenced by certificates, are subordinated, if in the event of liquidation or bankruptcy the claims may be satisfied only after claims of the other non-subordinated creditors have been satisfied.

**§ 46.** (1) Assets shall be shown under the appropriate balance sheet items even if the credit institution drawing up the balance sheet has pledged them as security for its own liabilities or liabilities of third parties or has otherwise assigned them to third parties as security.

(2) Assets pledged for the benefit of the credit institution or which have been otherwise assigned to it as security shall be shown in the balance sheet only if they are cash deposits.

**§ 47.** (1) In case of syndicated loans, each participating credit institution shall show in its balance sheet only its portion of the total loan.

(2) If in case of syndicated loans the amount guaranteed by the credit institution drawing up the balance sheet exceeds the amount of loans it has made available, the additional guarantee shall be shown in the balance sheet as a contingent liability in item 1 lit b.

**§ 48.** (1) Assets held in trust by a credit institution in its own name but on another's account must be shown in the balance sheet of the trustee. The total amounts of such claims and liabilities shall be shown separately or in the notes on the accounts, broken down according to assets and liabilities items. The trust assets may be shown off the balance sheet if a special provision enables their exclusion from the estate in case of a court-ordered liquidation of the credit institution.

(2) Assets acquired on behalf and for the account of a third party may not be shown in the balance sheet.

**§ 49.** Only amounts which can be withdrawn at any time without prior notice or for which a maturity or a period of notice of twenty-four hours or of one working day has been agreed shall be considered as repayable on demand.

**§ 50.** (1) Sale and repurchase transactions are transactions whereby a credit institution or the customer of a credit institution (transferor) transfers assets belonging to him to another credit institution or to one of its customers (transferee) against payment of a specific amount and whereby it is at the same time agreed that the assets will, at a later stage and against repayment of the amount received or of another amount previously agreed upon, be transferred back to the transferor.

(2) A genuine sale and repurchase transaction is a transaction whereby the transferee obligates himself to return the assets at a specific prearranged date or at a date later to be determined by the transferor.

(3) A non-genuine sale and repurchase transaction is a transaction whereby the transferee is merely entitled to return the assets at a prearranged date or at a date later to be determined by him.

(4) In the case of genuine sale and repurchase transactions, the assets transferred shall continue to appear in the transferor's balance sheet. The transferor shall show an amount owed to the transferee in the amount of the sum received in exchange for the transfer. If a higher or lower amount has been agreed upon for the retransfer, the difference in value shall be distributed over the term of the sale and repurchase transaction. The transferor shall furthermore disclose the book value of the assets transferred in the notes on his accounts. The transferee may not show the assets sold under a sale and repurchase transaction in his balance sheet; he shall show in his balance sheet a claim against the transferor in the amount of the sum paid in exchange for the transfer. If a higher or lower amount has been agreed upon for the retransfer, the difference in value shall be distributed over the term of the sale and repurchase transaction.

(5) In the case of non-genuine sale and repurchase transactions, the assets shall not be shown in the balance sheet of the transferor, but in the balance sheet of the transferee. The transferor shall show in his balance sheet the amount agreed upon for the case of a retransfer.

(6) Foreign exchange forward transactions, exchange forward transactions and similar transactions as well as the issuance of own bonds for a shortened term are not to be considered sale and repurchase transactions.

### Provisions Relating to Certain Balance Sheet Items

**§ 51.** (1) Cash in hand comprises domestic or foreign legal tender. Balances with central banks and postal giro offices in the states where the credit institution drawing up the balance sheet has established branch offices shall be considered balances available at all times with these institutions. Other claims against these institutions shall be shown as claims against credit institutions (Assets item 3) or as claims against customers (Assets item 4).

(2) Federal treasury bills, treasury bill assignments and similar bonds issued by public authorities shall be shown under Assets sub-item 2(a) if they are eligible for refinancing with the central banks of the states in which the credit institution has established branch offices. Bonds issued by public authorities that fail to meet the aforementioned condition shall be shown under Assets sub-item 5(a). Bills of exchange held in portfolio purchased from a

credit institution or from a customer shall be shown under Assets sub-item 2(b) if they are eligible for refinancing with the central banks of the states in which the credit institution has established branch offices. Bills of exchange that do not meet these conditions shall be shown under Assets items 3 or 4.

(3) Claims against credit institutions include all types of claims arising out of banking transactions with domestic or foreign credit institutions, regardless of their actual designation. Excepted are only claims evidenced by bonds or other certificates; these shall be shown under Assets item 5.

(4) Claims against customers include all types of claims against domestic or foreign non-banks, regardless of their actual designation. Excepted are only claims evidenced by bonds or any other security; these shall be shown under Assets item 5.

(5) Bonds and other fixed income securities include only securities admitted to trading on the stock exchange. Bonds issued by public authorities shall, however, be included only to the extent that they are not to be shown under Assets item 2. Fixed income securities also include securities with a floating interest rate, if this rate is linked to a specific factor such as, for example, an interest rate on the interbank market or on the euro market. Only repurchased own bonds admitted to trading on the stock exchange may be shown under the sub-item to Assets item 5 lit b.

(6) Liabilities to credit institutions include all types of liabilities originating from banking transactions with domestic or foreign credit institutions, irrespective of their actual designation. Excepted are only liabilities in the form of bonds or otherwise evidenced by certificates; these shall be shown under Assets item 5.

(7) Liabilities to customers include all types of liabilities to creditors that are not credit institutions within the meaning of para 6, irrespective of their individual designation. Excepted are only liabilities in the form of bonds or otherwise evidenced by certificates; these shall be shown under Assets item 5.

(8) Liabilities evidenced by certificates include bonds as well as obligations for which transferable certificates have been issued; in particular, "certificates of deposit", "bons de caisse" and liabilities arising out of own acceptances and promissory notes belong to this category. Only acceptances issued by the credit institution for its own refinancing and where the credit institution is the primary drawee are considered own acceptances.

(9) Subordinated liabilities are liabilities whether or not evidenced by certificates that, according to contractual obligations, shall in case of liquidation or bankruptcy be satisfied only subsequent to the claims of other creditors.

(10) The subscribed capital comprises all amounts that, in accordance with the legal form of the credit institution, have been rendered as capital contributions by the shareholders or other owners. The subscribed capital shall be shown at its nominal value, in case of shares without nominal value with the correlating amount of share capital. Contributions that are due but have not been called in shall be openly deducted from this amount. Amounts called in but not yet paid up shall be shown under Assets item 13.

(11) Capital reserves are assets that have been supplied to the credit institution by the shareholders or other owners or third parties as own funds and that are not subscribed capital.

(12) Profit reserves are amounts set aside in the current or in a previous business year out of the annual surplus.

(13) Contingent liabilities comprise all transactions where the credit institution has underwritten the obligations of a third party. The type and amount of each contingent liability that is material in relation to the overall activity of the credit institution shall be stated in the notes on the accounts. Liabilities arising from sureties and the providing of securities comprise all guarantee obligations incurred on behalf of third parties and all assets pledged as collateral security for third-party liabilities, in particular sureties and irrevocable letters of credit.

(14) Credit risks comprise all irrevocable obligations that might give rise to a credit risk. Type and amount of each commitment which is material in relation to the overall activity of the credit institution shall be stated in the notes on the accounts. Obligations arising from sale and repurchase transactions include the reassumption duties entered into by the credit institution as transferor in the context of non-genuine sale and repurchase transactions.

### Special Provisions Relating to Certain Items of the Profit and Loss Account

**§ 52.** (1) The following shall in particular be shown as interest and interest-like earnings and as interest and interest-like expenditures:

1. earnings from assets entered under Assets items 1 through 5 of Annex 2 to § 43, part 1, however calculated; further the earnings and reductions in earnings resulting from the distribution over time of the differential amount pursuant to § 56 paras 2 and 3;
2. expenditures for the Liabilities items shown under items 1, 2, 3, 7 and 8 of Annex 2 to § 43, part 1, however calculated; further the expenditures and reductions in expenditures resulting from the distribution over time of the differential amount pursuant to § 56 paras 2 and 3;
3. interest-like earnings and expenditures resulting from covered forward transactions, spread over the actual duration of the respective transaction; and
4. interest-like fees and commissions that are calculated according to term or amount of the claim or liability.

(2) Earnings from shares in investment funds shall also be shown as earnings from securities and participations.

(3) Earnings and expenditures from commissions comprise the earnings and expenditures arising in the provision of services business, in particular:

1. commissions for sureties, commissions for the administration of loans for the account of other creditors and for the trading in securities;

2. commissions and other earnings and expenditures in respect of payment transactions, account administration charges and commissions for the safe custody and administration of securities;
3. commissions for transactions in foreign currency, foreign notes and coins, and precious metals; and
4. commissions charged for brokerage services in connection with loans, savings contracts and insurance contracts.

(4) The following shall be shown as earnings/expenditures from financial transactions:

1. the balance of earnings and expenditures in securities transactions that are not valued as financial assets and are part of the business stock, as well as value adjustments with respect to these securities and earnings resulting from the dissolution of these value adjustments;
2. the balance of earnings and expenditures in the foreign exchange business; and
3. the balances of earnings and expenditures from business transactions concerning other assets, in particular precious metals, and concerning financial instruments.

**§ 53.** (1) Items 11 and 12 include, on the one hand, the expenditures for value adjustments in respect of claims shown under Assets items 3 and 4, and for provisions formed for contingent liabilities and for credit risks shown under items 1 and 2 of the balance sheet, and, on the other hand, the earnings resulting from recovery of written-off claims and from dissolution of value adjustments and provisions previously formed.

(2) These items also comprise the balance of earnings and expenditures arising from transactions in securities included under Assets items 5 and 6 that are not valued as financial investments within the meaning of § 55 para 2 and are not included in the trading portfolio, as well as the value adjustments and the earnings from dissolution of value adjustments of such securities. If § 56 para 5 has been applied, the difference will be taken into account that has resulted from the application of § 56 para 5. The designation of the items shall be changed accordingly when those earnings and expenditures are taken into account.

(3) The earnings and expenditures pursuant to paras 1 and 2 may be set off against each other.

**§ 54.** (1) Items 13 and 14 contain, on the one hand, the expenditures for value adjustments for assets shown under Assets items 5 through 8, and, on the other hand, the earnings from the dissolution of value adjustments formed earlier, if the expenditures and earnings on securities that are valued as financial investments within the meaning of § 55 para 2 concern participations and shares in affiliated companies.

(2) The expenditures and earnings pursuant to para 1 may be set off against each other.

### Valuation Rules

**§ 55.** (1) Assets items 9 and 10 shall be valued as fixed assets. Assets included in other balance sheet items shall be valued as fixed assets if they are intended to serve the business operation on a permanent basis.

(2) As far as credit institutions are concerned, financial assets shall mean participations, shares in affiliated companies as well as securities intended to serve the business operation on a permanent basis.

**§ 56.** (1) Bonds and other fixed income securities that have the qualities of financial assets shall be treated as fixed assets for balance sheet purposes.

(2) If the purchase price of these securities exceeds the amount repayable, the differential amount shall be entered as expenditure in the profit and loss account. The differential amount may also be written off in installments. In this case it shall, however, be shown separately in the balance sheet or in the notes on the accounts.

(3) If the purchase price of these securities is lower than the amount repayable, the differential amount may be released to earnings in installments over the entire residual maturity until repayment has been effected. The differential amount must, however, be shown separately in the balance sheet or in the notes on the accounts.

(4) If securities admitted to trading on the stock exchange that do not have the quality of financial assets are shown in the balance sheet with their purchase price, the credit institutions shall show the differential amount between the purchase price and the higher market value on the balance sheet date in the notes on the accounts.

(5) Securities admitted to trading on the stock exchange that do not have the quality of financial assets may be valued at the higher market value on the date of the balance sheet. The differential amount between acquisition costs and the higher market value shall be shown in the notes on the accounts.

**§ 57.** (1) Claims of credit institutions, securities with the exception of those that are valued as fixed assets or included in the trading portfolio, claims against credit institutions as well as loans to non-banks may be valued at a lower value than would result from an application of §§ 203, 206 and 207 Commercial Code, if due caution should warrant this in view of the particular risks associated with banking. The difference between the valuations pursuant to §§ 203, 206 and 207 Commercial Code may not exceed 4% of the total amount of the listed assets. § 201 para 1 No 4 Commercial Code shall apply, taking into account the peculiarities of the banking business.

(2) The valuation formed pursuant to para 1 may be maintained until the credit institution decides to adjust the valuation.

(3) For the purpose of safeguarding against general banking risks, credit institutions may, on the liability side of their balance sheet, introduce a special item 6 A with the designation “fund for general banking risks”. Only such amounts may be placed in this fund as the credit institution, applying due caution, deems necessary for the coverage of particular risks associated with the banking business. Additions to and withdrawals from the fund shall be

shown separately in the balance sheet of the credit institution. The fund must be at the unrestricted and immediate disposal of the credit institution for the purpose of settlement of losses.

(4) The balance of additions to and withdrawals from the "fund for general banking risks" shall be shown separately in the profit and loss account.

**§ 58.** (1) Assets and liabilities denominated in foreign currency shall be translated at the spot rate of exchange on the balance sheet date.

(2) Forward transactions shall be translated at the forward rate ruling on the balance sheet date.

(3) The difference between the book value of the assets, liabilities and forward transactions and the amount resulting from the translation pursuant to paras 1 and 2 shall be included in the profit and loss account.

**Consolidated Financial Statement**

**§ 59.** (1) The superordinate credit institution shall draw up a consolidated financial statement and a consolidated annual report for the group of credit institutions. § 30 and paras 2 through 5 shall govern with respect to the scope of consolidation.

(2) A subordinated credit institution need not be included into the consolidation if the temporary ownership of stock or shares held in this company is attributable to a financial assistance operation intended to reorganize or rescue said company in its entirety. If such a credit institution is not included in the consolidated financial statement, its annual financial statement shall be attached to the consolidated financial statement. Additional information on the nature and terms of the financial assistance operation shall be included in the notes on the accounts.

(3) § 249 paras 2 and 3 Commercial Code shall apply to subordinated institutions that are not credit institutions.

(4) A participation need not be included in the group of credit institutions if the inclusion would result only by virtue of applying § 30 para 1 No 7.

(5) § 30 para 4 shall not apply if the supervisory body or a minority of share owners, whose share interest reaches 10% of the share capital or of the nominal value of 1.4 million euro demands otherwise.

(6) In the consolidated balance sheet, fixed assets of leasing companies that serve leasing purposes shall be attributed to the individual categories of claims with the cash value of the discounted leasing claims.

(7) When consolidating ancillary banking services companies within the meaning of § 2 No 27 that are run on an at cost basis, revenues resulting therefrom may be set off with the pro rata expenses if the revenues stem from turnover with companies that are not to be fully consolidated and if reimbursement of the expenses by theses companies is governed by contract.

**§ 59 a.** (1) A superordinated credit institution that draws up a consolidated financial statement according to international accounting standards pursuant to § 245 a para 1 Commercial Code is not obligated to apply the Annex to § 43 as well as §§ 45 through 59 and § 64 para 4, if the consolidated

financial statement and the consolidated annual report comply with the provisions of Council Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions, OJ No L 372 of December 31, 1986, p. 1 and if the requirements of § 245 a para 1 Nos 2 through 5 and para 2 are met.

(2) The FMA may by way of regulation determine the layout of a consolidated financial statement pursuant to para 1.

**Bank Auditors**

**§ 60.** (1) The annual financial statement of each credit institution and the consolidated financial statement of each group of credit institutions pursuant to § 59 para 1 as well as each group of credit institutions pursuant to § 59 a para 1 shall, together with the bookkeeping, the notes on the accounts, the annual report and the consolidated annual report pursuant to § 59 and § 59 a para 1, be audited by bank auditors.

(2) In the case of a credit institution having the legal form of a cooperative, the auditor of its auditing agency authorized by statute appointed in accordance with the cooperative's rules shall perform the role of bank auditor pursuant to § 60. This shall also apply to stock corporations to which the banking enterprise or the banking business of a cooperative has been transferred pursuant to § 92 para 7.

(3) The information, presentation and inspection rights (§ 272 Commercial Code) of the bank auditor shall extend to all documents and data storage devices, even if they are managed or stored by third parties or if they are managed or stored abroad. If documents to be audited, in particular accounting records, are managed or stored abroad, the credit institution shall, irrespective of the foregoing inspection rights of the bank auditor, ensure that the documents of the current business year and of at least the preceding three business years are available in Austria.

**§ 61.** (1) Bank auditors are certified public accountants or firms of certified public accountants appointed as auditors and the auditing bodies (auditors, Auditing Agency of the Savings Banks' Auditing Association) of auditing agencies authorized by statute. The auditing associations of cooperatives and the Auditing Agency of the Savings Banks' Auditing Association shall in connection with the guarantee facility pursuant to § 93 assume tasks at the member credit institutions in the context of an early-warning system. In the case of credit institutions that are members of the Association of Banks and Bankers or of the Association of State Mortgage Banks, the duties under the early-warning system shall be assumed by the guarantee facilities of these trade associations; for purposes of the early-warning system, the bank auditors of these credit institutions shall cooperate with the respective guarantee facility. The Oesterreichische Nationalbank is authorized to communicate data reports of those credit institutions that need the aforementioned guarantee facilities for purposes of the early-warning system to the guarantee facilities concerned.

(2) Persons with respect to whom grounds for disqualification pursuant to § 62 of this federal statute or pursuant to § 271 Commercial Code exist may

not be appointed as bank auditors; § 271 para 1 Commercial Code shall not apply to credit cooperatives and to stock corporations pursuant to § 92 para 7.

**§ 62.** Grounds for disqualification are circumstances that would suggest that an orderly audit appears to be unlikely. Grounds for disqualification exist, in particular, if:

1. the bank auditor is not qualified and is missing the required expertise and qualification for bank auditing because of a lack of education. The theoretical and practical qualifications are to be proven by means of a national or nationally recognized aptitude examination equivalent to a university diploma according to Article 4 of Directive 84/253/EC. The examination according to § 13 of the Cooperative Auditing Act 1997, GenRevG 1997, BGBl I No 127/1997 is a valid examination. The practical qualification is considered fulfilled by a position lasting at least three years with a recognized auditing association or with the Savings Institution's Auditing Association or with a certified public accountant or a certified public accountant firm, if the position covered, in particular, the auditing of annual accounts or group annual accounts and the auditing of the accounts of cooperatives, savings institutions and corporations;

1 a. the bank auditor fails do demonstrate that he ensures through continuing education that his knowledge and experience pursuant to No 1 is up to date; annual certificates on quality assurance shall be issued by a qualified authority within the same audit association or statutory audit agency or by another auditor; the bank auditor shall show in particular his knowledge of the respective provisions applicable to credit institutions on the lawfulness of the financial statements and of the other provisions listed in § 63 paras 4 through 6 a.

1 b. the bank auditor is neither a member of an internationally active accounting firm, nor does he have, by contractual arrangement, an equivalent access to a group of accounting firms, nor is he able to draw on equivalent experience by other means; this prerequisite shall not apply to auditing bodies of statutory audit agencies;

2. the liability for auditors of a cooperative auditing association, for the Savings Institution's Auditing Association or for certified public accountants or auditing agencies is not adequately covered by members' contributions or insurance; the insured amount may not be lower than the one required pursuant to § 63 para 8;
3. the bank auditor holds shares in the audited credit institution whose amount reaches 20% of the paid up capital or the nominal amount of 70,000 euro;
4. at least 20% of the bank auditor's (excluding statutory auditing associations) respective total annual income from his professional activity within the past five years has stemmed from his functioning as auditor and advisor of the credit institution to be audited and from companies in which the credit institution to be audited holds at least 20% of the shares, and the same earning situation is expected to apply in the current business year;

5. his economic independence from the credit institution to be audited is not guaranteed, in particular because the latter substantially contributes to the bank auditor's financing by means of capital participation or extension of loans;

6. the personal independence of the bank auditor from the credit institution to be audited is not guaranteed, in particular because he performs a service other than counseling for the credit institution to be audited or participates in the recording of business transactions in the accounting field or in the preparation of financial statements in areas he himself is to audit;

6a. within the six years preceding the business year to be audited the bank auditor has audited the credit institution or the group of credit institutions as accountant, accounting firm or comptroller of a statutory auditing association; in cases where the audit was not performed by a physical person as bank auditor, this shall also apply to the head of audit and to the person having signed the audit certificate; in the sphere of competence of the Auditing Agency of the Savings Banks' Auditing Association however, it shall apply only to the head of audit;

7. the auditing association of the cooperative societies which appoints the bank auditor itself conducts banking business (mixed association), unless the auditing bodies (comptrollers) and the auditing agencies are independent and not bound by instructions of the management of the credit institution;

8. the bank auditor is or was within three years prior to his appointment either a legal representative or a member of the supervisory board or an employee of the credit institution to be audited;

9. the bank auditor is a legal representative or member of the supervisory body of a legal person, partner in a partnership or owner of a company, and the legal person, partnership or company is affiliated with the credit institution to be audited, and he holds together with them at least 5% of the shares;

10. the bank auditor is employed by a company affiliated with the credit institution to be audited or holds at least 5% of its shares or is employed by a physical person holding at least 5% of the shares of the credit institution to be audited; if the bank auditor is employed by a cooperative audit association which also holds shares in the credit institution to be audited, this share may not exceed 20% if the independence of the bank auditor is guaranteed in another adequate manner;

11. the bank auditor is a legal representative, a member of the supervisory board or a partner of a legal person or physical person or partnership, owner or employee of a company, and the legal person or physical person, the partnership or one of its partners or the company may, pursuant to No 6, not be bank auditors of the credit institution to be audited;

12. the bank auditor employs a person during his audit who may not be a bank auditor pursuant to Nos 3 through 6 and Nos 8 through 11;

13. the bank auditor exercises his profession together with a person disqualified pursuant to Nos 2 through 12 or together with the latter meets the conditions of Nos 3 or 4;
14. the ethical character of the bank auditor has been compromised, in particular because grounds for exclusion within the meaning of § 13 Trade Act 1994 or circumstances within the meaning §§ 9 and 10 of the Certified Public Accountants' Professional Code – WTBG, BGBl I No 58/1999, exist;
15. the bank auditor does not perform his activity with the required professional diligence, in particular if his audit acts within the past five years have shown serious flaws.

**§ 62 a.** Unless a higher amount applies pursuant to § 275 para 2 Commercial Code, the bank auditors' liability per audited credit institution shall be limited with the following amounts: two million euro in case the credit institution's balance sheet sum does not exceed one billion euro, three million euro in case the credit institution's balance sheet sum does not exceed five billion euro, four million euro in case the credit institution's balance sheet sum does not exceed fifteen billion euro, and six million euro in case the credit institution's balance sheet sum exceeds fifteen billion euro. In cases of gross negligence the liability shall not exceed the fivefold figure of the above amounts. In cases of intent liability is unlimited.

**§ 63.** (1) The appointment of bank auditors, except those that are auditing bodies of auditing agencies authorized by statute, shall take place prior to the beginning of the business year to be audited and shall, without delay, be reported in writing to the FMA. The FMA may object within the meaning of § 270 para 3 Commercial Code to the appointment of a bank auditor; insofar as the appointment had to be reported, the objection must be raised within one month. The court shall decide on the merit of the objection, taking into account the grounds for disqualification.

(1 a) If, however, there is a reasonable doubt that serious disqualification grounds exist that cannot be remedied at short notice, in particular because of information received pursuant to para 1 c, the FMA may itself prohibit the appointment of an unqualified bank auditor or, in case of imminent danger, appoint itself a different bank auditor. If reasonable doubt as to the existence of serious grounds of disqualification that cannot be remedied at short notice should surface after the appointment of a bank auditor, the FMA may order the immediate appointment of a different bank auditor or, in case of imminent danger, appoint itself a different bank auditor. Para 1 shall apply, however, in case of an auditor appointed by the court pursuant to § 270 Commercial Code.

(1 b) The FMA shall without delay inform the credit institution and the competent court pursuant to § 270 para 3 Commercial Code of all measures taken under para 1 a.

(1 c) Within two weeks following his appointment, the bank auditor shall demonstrate to the FMA that no grounds for his disqualification exist. Upon

the FMA's request, he shall provide all further evidence required to evaluate this fact. The FMA may proceed pursuant to para 1 or para 1 a if its request is not met.

(2) The provisions of §§ 268 through 270 Commercial Code concerning the audit of annual financial statements (consolidated financial statements) shall apply to credit institutions with the proviso that the bank auditor shall act in lieu of the auditor. The bank auditors shall participate as expert informants in the deliberations concerning the annual financial statement of the supervisory bodies established pursuant to statute and articles of association.

(3) If facts are established by the bank auditor, on the basis of which he judges that the functioning of the credit institution or the fulfillment of its obligations is no longer guaranteed or that statutory or other legal provisions instrumental to banking supervision or rulings of the Federal Minister of Finance or of the FMA have been violated, he shall without delay report these facts together with his comments in writing to the FMA and to the Oesterreichische Nationalbank. In case of minor shortcomings that can be remedied at short notice, however, notification shall be given only if the credit institution does not, within an appropriate time limit not exceeding three months set by the bank auditor, remedy the exposed shortcomings. Notification shall also be made if the managers fail to provide in due form and within an appropriate time limit set by the bank auditor information requested by the latter. Auditors appointed by an auditing association shall communicate notifications under this paragraph to the auditing association, which shall immediately transmit them.

(3 a) Para 3 shall also apply if the bank auditor is acting as auditor of a company closely connected (§ 228 para 3 Commercial Code) with the credit institution.

(3 b) If the bank auditor makes a report in good faith pursuant to para 3 or 3 a, this shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory, or administrative provision and shall not involve him in liability of any kind.

(4) The bank auditor shall examine whether the annual financial statement complies with statutory provisions. The audit shall also comprise:

1. the accuracy of the valuation, including whether required depreciations, value adjustments and provisions have been made;
2. timely and full compliance with §§ 21 through 27, 29 as well as 73 para 1 and 75;

2 a. compliance with §§ 10 through 18 Securities Supervision Act;

3. compliance with the other provisions of this federal statute and with all other legal provisions relevant to credit institutions; and
4. compliance with § 230 a Civil Code, §§ 66 and 67 as well as with the regulation issued pursuant to § 68 para 2.
5. the correct inclusion of positions in the trading book as well as any transfers according to internal criteria applicable to their inclusion in the trading book;
6. in the case of credit institutions that do not apply § 22 b para 2,
   a) the manner in which the qualifying items are assessed;

b) the alternative methods of valuation used to calculate the market price pursuant to § 22 a No 2;
c) the model used to evaluate options, in particular the determination of the volatilities and of the other parameters for calculating the delta pursuant to § 22 e para 3;
d) the evaluation of the other risks associated with options pursuant to § 22 e para 4.

(5) The result of this audit shall be included in a separate bank supervision audit report. This report shall be communicated to the managers and to the supervisory bodies of the credit institution existing according to statute or articles of association together with the audit report on the annual financial statement in such timely manner that the time limit of § 44 para 1 may be met.*)

(6) The bank auditor shall verify the information referred to in § 44 para 4 of branch offices of credit institutions as defined in § 9 para 1 and financial institutions as defined in § 11 para 1 and § 13 para 1 that conduct business in Austria pursuant to § 1 para 1 Nos 2 through 8, 11 and 15 through 17. The verification shall comprise:

1. the accuracy and congruity with the annual financial statement (§ 44 para 3); and
2. compliance with the provisions referred to in §§ 9 para 7, 11 para 5 and 13 para 4 and compliance with §§ 10 through 18 Securities Supervision Act.

(6 a) In case of branches of investment firms pursuant to § 9 a, compliance with §§ 10 through 18 Securities Supervision Act shall be verified and a report shall be drawn up which consists of part I Section 10 of the regulation on the bank supervision audit report. This report shall be drawn up and communicated to the managers of the branches in a timely fashion, allowing that the presentation time limit pursuant to § 44 para 5 a can be met.

(7) The result of the verification shall be included in a separate bank supervision audit report. This report shall be communicated to the managers of branch offices of Member State credit institutions (financial institutions) in Austria at the same time as the audit report on the annual financial statement in such timely fashion that the terms for transmission set forth in § 44 paras 3 through 5 can be met.

(8) Bank auditors under an insurance obligation pursuant to § 62 No 2 shall take out liability insurance covering the risk resulting from the auditing of banks with an insurance company authorized to conduct the insurance business in a Member State. Statutory auditing associations shall have the right to elect between covering the liability through membership contributions or through liability insurance according to the provisions of this paragraph. The cover of the insurance contract per audited credit institution shall amount to at least 2 million euro in case the credit institution's balance sheet sum amounts up to one billion euro, at least 3 million euro in case the credit

*) *See* Regulation on the Bank Supervision Audit Report, BGBl No 119/1994, as amended by BGBl II Nos 30/1997, 181/1997, 387/1998, 378/1999, 231/2000, 322/2000 and 369/2001.

institution's balance sheet sum amounts up to five billion euro, at least 4 million euro in case the credit institution's balance sheet sum amounts up to 15 billion euro and at least 6 million euro in case the credit institution's balance sheet sum exceeds 15 billion euro. In the case of credit institutions belonging to a statutory auditing association and choosing to take out liability insurance, the cover of the insurance contract shall amount to at least 6 million euro plus a surcharge depending on the number of member institutions. The cover surcharge shall amount to one million euro each per 100 members, the number of members being rounded to the next 100. In the case of credit institutions belonging to a trade association in which several statutory auditing associations with differing, in particular local jurisdictions, exist, liability insurance may be taken out for all members of the trade association by the auditing association with the largest area of jurisdiction. The insurance premium shall be paid in full at the latest three weeks following the bank auditor's appointment; the bank auditor shall prove the existence of such insurance as well as payment of the insurance premium to the FMA within four weeks following his appointment as bank auditor; statutory audit associations shall prove the existence of such insurance as well as payment of the insurance premium to the FMA within the first quarter of the year following the year to be audited.

**§ 63a.** (1) The supervisory board or the supervisory body of the credit institution otherwise competent under statute or articles of association may commission accountants or accounting firms with carrying out audits of the legality and correctness of the entire business and for this purpose request statutory auditing bodies to appoint an auditor. They shall be provided with an audit mandate. § 61 para 2 shall apply to the auditors active under the mandate of the supervisory body. The auditor active under the mandate of the supervisory body shall report to the Chairman of the supervisory board on the matter pursuant to para 3. The auditor shall without delay inform the Chairman of the supervisory body if serious defaults have been found with respect to the correctness or legality of the business. Otherwise, the auditors appointed by the supervisory body are bound by the obligation to maintain banking secrecy pursuant to § 38.

(2) Credit institutions are obligated to enable auditors appointed by the supervisory body to take audit measures pursuant to § 71 para 2 and para 3 Nos 1 through 3.

(3) The bank auditor appointed pursuant to § 61 is authorized to also contact the Chairman of the supervisory body outside the scope of audit mandates if a report to the managing director would, in view of the type and circumstances of the violations detected, not achieve the purpose of curing the defaults or if they are of a serious nature.

### Notes on the Accounts

**§ 64.** (1) In addition to §§ 236 through 240 Commercial Code, credit institutions shall include the following information in the notes on the accounts:

1. the amounts with which the credit institutions have participated in the leasing business;
2. the total amount of Assets and Liabilities items expressed in foreign currency;
3. a list of forward transactions not yet executed on the date of the balance sheet;
4. a breakdown of claims and credits not due on a daily basis and the liabilities to credit institutions and non-banks not due on a daily basis according to the following remaining maturities:
   a) up to three months;
   b) more than three months but not more than a year;
   c) more than a year but not more than five years;
   d) more than five years;
5. in case of every subordinated loan exceeding 10% of the total value of subordinated liabilities:
   a) the amount of the loan, the currency in which it is issued, the interest rate and the maturity or the indication that it is a permanent issuing;
   b) if applicable, an indication whether circumstances exist pursuant to which premature repayment is to be effected;
   c) the conditions of subordination, if applicable also provisions on transformation of the subordinated liabilities into capital or into another form of liability and the conditions therefor;
6. in case of other subordinated loans taken out, a general description of the terms;
7. in case of bonds and other fixed income securities as well as issued bonds, the amount of claims and liabilities that become due in the year following the balance sheet date;
8. a list of assets which credit institutions have pledged as security for their liabilities or for liabilities of third parties (including contingent liabilities) so that for each liability item and each balance sheet item the total amount of the assets pledged as security becomes recognizable;
9. a breakdown of interest earnings, earnings from securities and participations, earnings from commissions, earnings and expenditures from financial transactions and other business earnings by geographical markets, if those markets differ substantially from one another in terms of the organization of the credit institution;
10. a breakdown of securities admitted to trading on the stock exchange contained in the Assets items “bonds and other fixed income securities”, “stock and other variable income securities”, “participations as well as shares in affiliated companies”, by listed and unlisted securities;
11. a breakdown of securities admitted to trading on the stock exchange contained in the Assets items “bonds and other fixed income securities” as well as “stocks and other variable income securities”, according to whether they are valued pursuant to § 56 as fixed assets, and the criteria for differentiating between both categories of securities;
12. a breakdown of other assets, other liabilities, other business expenses, extraordinary expenses, other business earnings and extraordinary earnings

by the most important individual amounts, unless those amounts are insignificant in the evaluation of the annual financial statement. Their amounts and types shall be explained;

13. the total amount of the credit institution's expenses for subordinated liabilities in the year under report;
14. the total amount of earnings for administrative and agency services performed by the credit institution for third parties, if, in relation to the credit institution's total activities, the scope of such transactions has been substantial; and
15. the information whether the credit institution keeps a securities trading book and if applicable the respective value of the securities and other financial instruments registered therein.

(2) Credit institutions that have issued participation capital shall provide information within the meaning of § 240 No 3 Commercial Code on this fact in the notes on the accounts.

(3) Interest pursuant to § 239 para 1 No 2 Commercial Code does not have to be stated in the notes on the accounts.

(4) Groups of credit institutions shall in addition to §§ 265 and 266 Commercial Code include the information referred to in paras 1 and 2 into the group's notes on the accounts (§ 59 para 1).

(5) Interest pursuant to § 266 para 5 Commercial Code does not have to be stated in the group's notes on the accounts.

(6) For credit co-operatives, § 239 para 1 No 4 Commercial Code shall apply with the consideration that the overall salary of the managers referred to in § 2 No 1 lit b shall be mentioned in the notes to the accounts in addition to the combined salaries of the members of the board of directors and the supervisory board. If a member of the board of directors was also nominated as a manager referred to in § 2 No 1 lit b, the person's salary as member of the board of directors needs to be mentioned in the category of salaries of the managers. If the allocation within the meaning of § 239 para 1 No 4 Commercial Code relates to less than three persons, it need not take place.

### Publication

**§ 65.** (1) Immediately after approval of the annual financial statement and of the consolidated financial statement pursuant to § 59 and § 59 a para 1, credit institutions shall publish these statements in the Official Gazette attached to the *Wiener Zeitung* or in a generally available publication. The annual report and the consolidated annual report pursuant to § 59 and § 59 a para 1 shall be kept at the corporate seat of the credit institution for inspection by the public.

(2) The following information contained in the notes on the accounts shall be published:

1. the information pursuant to §§ 236 and 239 Commercial Code;
2. the information pursuant to § 64 para 1; and
3. the information pursuant to §§ 222 para 2, 223 paras 1 and 2 and 226 para 1 Commercial Code.

(2 a) The following information contained in the notes on the consolidated accounts (§ 59 para 1 and § 59 a para 1) shall be published:

1. the information pursuant to §§ 265 and 266 Commercial Code; and
2. the information pursuant to § 64 para 1.

(3) Branch offices of foreign credit institutions shall, in addition, publish the annual financial statement and the consolidated financial statement of the foreign credit institution in the Official Gazette attached to the *Wiener Zeitung* or in a generally available publication. The annual report and the consolidated annual report shall be kept at the seat of the credit institution for inspection by the public.

(3 a) Branch offices of credit institutions within the meaning of § 9 para 1 and of financial institutions within the meaning of § 11 para 1 and § 13 para 1 that conduct activities in Austria within the meaning of § 1 para 1 Nos 2 through 8, 11 and 15 through 17 shall publish the verified information referred to in § 44 para 4 as well as the annual financial statement and the consolidated financial statement of the credit institution (financial institution) in the Official Gazette attached to the *Wiener Zeitung* or in a generally available publication as well as keep these documents at the branch office for inspection by the public.

(4) The Federal Minister of Finance is, after hearing the FMA, authorized to conclude, on the basis of reciprocity, agreements with states that are not members of the European Economic Area in order to exempt branch offices of foreign credit institutions from the duty to disclose an annual financial statement relating to their own activity.

## Chapter XIII
## Provisions Concerning the Cover Fund Pursuant to § 230 a Civil Code

**§ 66.** A credit institution that sets up a cover fund within the meaning of § 230 a Civil Code shall enter the assets appertaining to the cover fund in a special list to be continually updated (cover register); cash is to be kept separately.

**§ 67.** (1) The cover fund within the meaning of § 230 a Civil Code shall not be subject to enforcement of judgments, excepting those in favor of savings deposits held in trust for a ward.

(2) In bankruptcy proceedings the cover fund forms a special fund in favor of claims of savings deposits held in trust for a ward (§§ 11 and 48 Bankruptcy Code). Should the cover fund not suffice to satisfy the claims arising from wards' deposits, these claims shall be satisfied on a pro rata basis.

**§ 68.** (1) In his audit pursuant to § 63 para 4 No 4 the auditor shall in particular examine the orderly administration of the cover fund.

(2) The Federal Minister of Finance shall with the consent of the Federal Minister of Justice determine by way of regulation:

1. for those credit institutions that accept savings deposits to be held in trust for a ward, simultaneously setting up cover funds:
   a) the form of
      aa) the acceptance of wards' savings deposits,
      bb) the establishment of the cover fund, in particular with respect to its separation from the other assets, and
      cc) the termination of this precaution when full legal capacity is reached, as well as
   b) the dates, the form and the layout of the reports to be drawn up by the credit institutions;
2. for those credit institutions that accept savings deposits to be held in trust for a ward without setting up a cover fund:
   a) the form of acceptance of savings deposits held in trust for a ward; and
   b) the form of reporting accepted savings deposits held in trust for a ward.*)

## Chapter XIV
## Supervision

**§ 69.** Irrespective of tasks assigned to it in other federal statutes, the FMA shall:

1. monitor credit institutions within the meaning of § 1 para 1;
2. monitor pursuant to § 16 para 1 credit institutions within the meaning of § 1 para 1 conducting business in other Member States by way of the freedom of establishment or the freedom to provide services;
3. monitor pursuant to § 15 credit institutions admitted in a Member State within the meaning of Art 1 No 1 first indent of Directive 2000/12/EC that have their corporate seat in the respective Member State and conduct business in Austria by way of freedom of establishment or freedom to provide services; and
4. monitor pursuant to § 17 financial institutions residing in a Member State within the meaning of Art 1 No 5 of Directive 2000/12/EC that conduct business in Austria by way of freedom of establishment or freedom to provide services

as to their compliance with the provisions of this federal statute, of the Savings Banks Act, of the Housing Construction Savings and Loan Associations Act, the Introductory Regulation to the Mortgage Banks Act and to the Mortgage Bonds Act, the Mortgage Banks Act, the Mortgage Bonds Act, the Statute on the Protection of Rights of Mortgage Bond Holders, the Bank Bonds Act, the Investment Funds Act, the Deposits Act, the Participation Funds Act and the E-Money Act. In so doing, it shall take into consideration the national economic interest in a functioning banking system and in the stability of the financial market.

*) *See* the Regulation on the Protection of Moneys Held in Trust for Wards, BGBl No 650/1993.

**§ 69 a.** (1) The allocation of the costs of banking supervision within the accounting group 1 pursuant to § 19 para 1 No 1 of the federal statute establishing the FMA (FMABG) to the credit institutions liable to pay the costs shall be effected pursuant to paras 2 and 3. The following entities are liable to pay the costs:

1. credit institutions pursuant to § 1 para 1;
2. credit institutions pursuant to § 9 para 1 that conduct business in Austria through of a branch office.

(2) For each credit institution liable to pay costs pursuant to para 1, its cost figure shall first be determined. For credit institutions pursuant to para 1 No 1 the cost figure shall be the own funds requirement shown in the monthly report for the preceding month of December. For credit institutions pursuant to para 1 No 2 the cost figure shall be the result of the following accounting steps:

1. The sum of the assets items to be shown pursuant to § 44 para 4 No 4 shall be provided with a weighting of 50%;
2. A fictitious own capital requirement of 8% shall be calculated for the weighted amount pursuant to No 1;
3. The cost figure shall be 5% of the fictitious own capital requirement pursuant to No 2.

(3) A ratio shall then be calculated for each credit institution from the ratio of the cost figure of each credit institution pursuant to Nos 1 and 2 to the sum of all cost figures. The allocation of costs remaining in accounting group 1 after deducting eventual profits to the individual cost bearers shall occur using their respective ratio.

(4) If the result of the calculation performed pursuant to para 3 is an amount less than 1,000 euro, supervisory costs of 1,000 euro shall be prescribed to the credit institution as supervision costs (minimum amount); the delta between the calculated cost share and the minimum amount shall be allocated to a provision that shall be shown in the following annual financial statements.

(5) The provision formed in one business year pursuant to para 4 shall be dissolved in the following annual financial statements of the FMA; contrary to § 19 para 4 of the FMABG, the profit resulting therefrom shall be deducted only from the costs of accounting group 1.

(6) If the calculation pursuant to para 3 shows for a credit institution an amount exceeding 0.8 per mil of its cost figure (para 2), an amount of 0.8 per mil of its cost figure shall be prescribed to it as supervisory costs.

(7) If the conditions of both paras 4 and 6 should apply to a credit institution, only para 4 shall apply.

**§ 70.** (1) To fulfill the duties imposed on it pursuant to § 69 Nos 1 and 2 and without prejudice to the powers granted to it pursuant to other provisions of this federal statute, the FMA may at any time in the interest of a continuous supervision of the credit institutions and groups of credit institutions:

1. demand from the credit institutions and from the superordinate credit institution on behalf of companies members of the group of credit institutions submission of interim financial statements, of reports exhibiting a certain form and structure, and of audit reports; furthermore demand from the credit institutions and from the superordinate credit institutions and their bodies information on all business matters; examine the books, documents and data storage devices, and have all necessary audits performed by bank auditors and by other auditors and audit associations, or by the competent audit and review associations and by other experts; the exclusionary grounds referred to in § 62 shall apply;*) § 60 para 3 shall apply to the scope of information, submission and inspection rights of the FMA and to the duty to make documents available in Austria.
2. obtain audit reports and information from the bank auditors and from the competent audit and review associations and provide to them the required information; furthermore, it may request all required information from the guarantee schemes and from the government commissioner appointed pursuant to para 2 No 2, and provide such information to them;
3. for the purpose of auditing credit institutions, their branch offices and representations outside of Austria, and companies of the group of credit institutions, appoint its own auditors or the Oesterreichische Nationalbank if the procedure is thereby substantially simplified or expedited or if it is in the interest of efficiency, simplicity, speed or cost saving. The FMA shall commission the Oesterreichische Nationalbank with on site audits in the area of banking supervision, when auditing the orderly limitation of market risks (§ 26 b para 1 Nos 1 through 4) and credit risks (§ 2 No 57). The obligation to commission the Oesterreichische Nationalbank shall not, however, apply, if the latter should inform the FMA that it cannot perform the audit in a timely manner. The Oesterreichische Nationalbank and the FMA are entitled to have own employees participate in audits by the respective other institutions; and
4. for the purpose of auditing companies that are members of the group of credit institutions as well as branch offices and representations in Member States and in third countries pursuant to § 77 para 5 Nos 2 and 3, also request the competent authorities of the host Member State to perform the audit, if this simplifies or expedites the procedure as opposed to an audit under No 3 or if this is in the interest of efficiency, simplicity, speed or cost saving; under these conditions, the involvement of own auditors in or the commissioning of the Oesterreichische Nationalbank to participate in an audit is also permitted; in the case of an audit of market or credit risks the FMA shall in any event involve the Oesterreichische Nationalbank in the audit; § 70 para 1 No 3 third sentence shall apply.

(2) In case of danger to the fulfillment of the obligations of a credit institution to its creditors, in particular to the safety of assets entrusted to it, the FMA may, in order to avert such danger, order by way of ruling temporary

*) *See* the Regulation on the Reporting of Reserves, BGBl No 970/1994, as amended by BGBl II No 395/1998.

measures which shall expire no later than 18 months after taking effect. The FMA may in particular by way of ruling:

1. prohibit entirely or in part the withdrawal of capital or profits as well as distributions of capital or profits;
2. appoint a competent supervisor (government commissioner) who is either an attorney or a public accountant; in the case of credit cooperatives, auditors of cooperative auditing associations may also be appointed; the supervisor, who shall have all the rights set forth in para 1 Nos 1 and 2, shall:
   a) prohibit the credit institution from conducting any business that is apt to increase the above mentioned danger, or
   b) in case the credit institution has been partially or fully prohibited from continuing its business operations, permit the performance of specific business transactions that do not increase the above-mentioned danger;
3. prohibit managers of credit institutions entirely or in part from managing the business, simultaneously informing the body competent for appointing the management; the competent body shall within one month newly appoint the necessary number of managers; in order to become legally valid, the appointment requires the consent of the FMA, which shall be denied, if the managers to be newly appointed appear not to be qualified to avert the above-mentioned danger; and
4. entirely or in part prohibit the continuation of the business operation.

(2a) Upon the request of the supervisor appointed pursuant to para 2 No 2 or para 3 (government commissioner), the FMA may appoint a deputy, if and as long as this should be necessary on important grounds, in particular because of temporary unavailability of the supervisor. The provisions applicable to the supervisor's appointment and to his rights and duties shall equally apply to his deputy. With permission of the FMA, the supervisor (government commissioner) may use qualified experts if this should prove necessary because of the scope and complexity of the tasks. The FMA's permission shall specifically name these persons and shall also be served on the credit institution. These persons shall act upon the instruction and on behalf of the supervisor (government commissioner) or his deputy.

(3) The FMA shall request nominations from the Austrian Bar Association, the Chamber of Auditors and the cooperative auditing associations concerning qualified government commissioners. If a government commissioner is to be appointed pursuant to para 2 No 2 or a deputy is to be appointed pursuant to para 2a and no appointment is possible on the basis of the nominations submitted, the FMA shall ask the regional Bar Association, Chamber of Auditors or cooperative auditing association at the corporate seat of the credit institution to nominate a qualified attorney, auditor or cooperative auditor as government commissioner. In case of imminent danger the Federal Minister of Finance may on a provisional basis appoint as temporary government commissioner:

1. an attorney, or
2. an auditor.

This appointment shall expire with the appointment of an attorney or auditor pursuant to the first sentence.

(4) If a condition for the granting of a license pursuant to § 5 para 1 Nos 1 through 13 or pursuant to § 5 para 4 no longer exists after the license has been granted, or if a credit institution violates provisions of this federal statute, the Savings Banks Act, the Housing Construction Savings and Loan Associations Act, the Introductory Regulation to the Mortgage Banks Act and to the Mortgage Bonds Act, the Mortgage Banks Act, the Mortgage Bonds Act, the Statute on the Protection of Rights of Mortgage Bond Holders, the Bank Bonds Act, the Investment Funds Act, the Deposits Act, the Participatory Funds Act, the E-Money Act or of a regulation or ruling passed on the basis of this federal statute, the FMA shall:

1. order the credit institution under threat of penalty to reestablish lawful conditions within a period appropriate in view of the circumstances of the case;
2. in case of repetition or continuation prohibit entirely or in part the managers of the credit institution from conducting business, unless this would be inadequate in view of the type and gravity of the breach, and restitution of the lawful conditions can be expected by repeating the proceeding pursuant to No 1; in this case the sanction initially imposed is to be executed and the order is to be repeated under threat of a higher fine;
3. revoke the license if other measures pursuant to this federal statute cannot secure the functionality of the credit institution.

(5) All measures ordered by the FMA pursuant to paras 2 and 2a shall be suspended for the duration of receivership (Chapter XVII).

(6) The government commissioner shall receive from the FMA a remuneration (function fee) in proportion to the work and expenses connected with the supervision. The government commissioner is entitled to invoice his services after every quarter of a year and upon completion of his activity. The FMA shall pay the remuneration immediately after auditing the invoice.

(7) For purposes of informing the public, the FMA may publish the measures pursuant to paras 2, 3 and 4 in the Official Gazette attached to the *Wiener Zeitung* or in a newspaper with Austria-wide circulation or on the internet or in a suitable location of the business offices of the credit institution. Measures pursuant to para 4 shall, however, only be published if this should prove to be necessary to inform the public because of the type and gravity of the breach. The means of publication may be chosen either alternately or cumulatively.

(8) The credit institutions shall without delay bring to the attention of the Chairman of the supervisory body all rulings issued by the FMA on the basis of provisions stated in § 69.

(9) Rulings that prohibit entirely or in part the managers of the credit institution from conducting business (para 2 No 3 and para 4 No 2) and any

lifting of such prohibitions shall be communicated by the FMA to the registry court for the purpose of registration in the commercial register.

**§ 70 a.** (1) If the parent company of a credit institution is a mixed-activity company, the FMA shall, without prejudice to the powers conveyed to him under other provisions of this federal statute, in the interest of a continued supervision of the credit institution be entitled at any time to request from the credit institution all information on the mixed-activity company as parent company and its subsidiaries. These companies shall provide the credit institution with all documents and all information necessary to enable the credit institution to meet its information duty vis-à-vis the FMA.

(2) Without prejudice to the powers conveyed to it by other provisions of this federal statute, the FMA may, pursuant to § 70 para 1 No 3, solicit on site the information to be supplied by the credit institution according to para 1 and verify the information supplied; § 71 shall apply. The bank auditors, the competent auditing and control associations or other experts that are independent of the mixed-activity company may also be instructed to carry out this audit. For the purposes of soliciting information or verifying the information supplied as regards the orderly limitation of market and credit risks, however, the FMA shall involve the Oesterreichische Nationalbank; § 70 para 1 No 3 third sentence shall apply.

(3) (*Repealed by federal statute BGBl I No 97/2001.)*

(4) If the mixed-activity company or one of its subsidiaries has its corporate seat in another Member State, the FMA shall ask the competent authorities of that other Member State to conduct the verification within the meaning of para 2.

**§ 71.** (1) The credit institution concerned shall be informed of audits within the meaning of § 70 para 1 Nos 3 and 4 with the initiation of examina-tory acts. Advance notice may be given if it is not expected to defeat the purpose of the audit and if due to organizational preparations by the credit institution such advance notice would facilitate and expedite the carrying out of the audit. In the case of audits of branch offices and representations as well as companies of a group of credit institutions outside of Austria the competent authority of the host Member State shall be informed at least simultaneously of the intended audit, unless an individual consent has already been issued pursuant to para 7. The auditing bodies shall be provided with a written examination mandate. They shall identify themselves of their own accord and produce the examination order prior to the beginning of the audit.

(2) The credit institutions shall put at the disposal of the auditing bodies the records necessary for the examination and grant them access to the books, documents and data storage devices and also provide oral information. During normal business and working hours, they shall grant the auditing bodies access to the business and work facilities at any time. § 60 para 3 shall apply to the scope of information, submission and inspection rights of the auditing bodies and to the duty to make documents available in Austria.

(3) The auditing bodies are entitled to request all information and business documents necessary to the examination from

1. the managers,
2. employees that have been named by the managers, and
3. any person employed in the business, insofar as the circumstances to be examined fall within the sphere of responsibilities of this person, as well as
4. from the bank auditors.

(4) Credit institutions shall provide the auditing bodies with suitable facilities and auxiliary means for the execution of the examination. If entries or records have been made by using data storage devices, the credit institution shall, at its own cost and within appropriate time, furnish those auxiliary appliances that are necessary in order to make the documents readable and, if necessary, produce the required number of permanent reproductions readable without auxiliary means.

(5) In the course of examinations pursuant to § 17 para 1 No 3, the auditing bodies shall take care that any interruption or hindrance of the business that is not absolutely necessary will be avoided.

(6) The conclusions reached in the examination shall be put in writing. The credit institution shall be provided with an opportunity to comment.

(7) Audits of branch offices, representations and companies of a group of credit institutions (§ 70 para 1 No 3) located outside of the territory of the Member States may be performed only with the consent of the state concerned. In the case of audits within the framework of cooperation with third countries pursuant to § 77 para 5 Nos 2 and 3 the consent of the competent authority of the country concerned shall suffice; this consent may also be given in the form of cooperation agreements between supervisory authorities pursuant to § 77 a.

(8) The provisions of the aforementioned paras 1 through 8 on the carrying out of audits of credit institutions shall also apply to the audit of the companies of a group of credit institutions.

**§ 72.** (1) All authorities shall assist both the Federal Minister of Finance and the Oesterreichische Nationalbank in the exercise of their statutory duties pursuant to this federal statute.

(2) The Federal Accounting Company with limited liability shall participate in the conduct of affairs for which the Federal Minister of Finance is responsible pursuant to this federal statute, to the extent that such participation lies in the interest of simplicity, efficiency or saving of costs.

(3) In the case of participation of the Federal Accounting Company with limited liability pursuant to para 2, the Federal Minister of Finance shall by way of regulation determine which areas are to be subject to such participation.

### Reporting Requirements

**§ 73.** (1) Credit institutions shall, without delay, report in writing to the FMA:

1. any amendment to their articles of association;
2. any change in the conditions pursuant to § 5 para 1 Nos 6, 7, 10 and 13 concerning active managers;
3. any personnel change concerning the managers and compliance with § 5 para 1 Nos 6 through 11 and 13;
4. the establishment, transfer, termination or temporary suspension of the business operations of the head office or of branch offices;
5. circumstances which allow a prudent manager to recognize that the ability to fulfill the obligations is endangered;
6. the occurrence of insolvency or of over-indebtedness;
7. any extension in the scope of their business purpose;
8. any reduction of the paid-up capital (§ 23 para 3) and the participation capital with the obligation of retroactive payment of dividends (§ 23 paras 4 and 5);
9. any non-compliance in excess of one month with standards prescribed by this federal statute as set forth in §§ 22 through 27 and 29 as well as by regulations and rulings issued thereunder;
10. termination of membership in the guarantee facility;
11. the person or persons responsible for internal audit as well as each change concerning such person or persons;
12. the falling of own funds to be taken into account below 120% of the own funds requirement pursuant to § 22 para 1 Nos 1 through 4, because of redemption and interest payments on the short term subordinated capital; and
13. termination of membership in the auditing association (Chapter three of the Cooperative Auditing Amending Act 1997 – GenRevRÄG 1997, BGBl I No 127/1997), if the credit institution has the legal form of a cooperative or is a member of a cooperative auditing association because of an asset transfer pursuant to § 92 (§ 8a Credit System Act – KWG, BGBl No 63/1979).

(2) Representations shall, within one month, report to the FMA:

1. their establishment,
2. the manager(s) of the representation,
3. their corporate seats,
4. changes in the circumstances referred to in Nos 1 through 3, and
5. their closing down.

(3) The superordinate credit institution shall without delay communicate in writing to the FMA the name, legal form, corporate seat and state of incorporation of a superordinate financial holding company as well as any subsequent changes. The FMA shall communicate a list of these financial holding companies to the European Commission and to the competent authorities of the Member States.

(4) The credit institutions shall without delay communicate in writing to the FMA:

1. the criteria for including positions in the trading book as well as any amendment of these criteria;

2. in the case of credit institutions that do not apply § 22 b para 2
   a) the criteria for assessing the qualifying items; the FMA shall regularly inform the Council and the European Commission of methods used to evaluate the qualifying items, in particular the methods used to assess the degree of liquidity of the issue and the solvency of the issuer;
   b) the methods of valuation used to calculate the market price pursuant to § 22 a No 2;
   c) the model used to evaluate options, in particular the determination of the volatilities, the other parameters for the calculation of the delta pursuant to § 22 e para 3 and of the other risks associated with options pursuant to § 22 e para 4.

(5) The credit institutions shall without delay communicate in writing to the FMA any case in which a counterparty in repurchase and reverse repurchase agreements or securities lending and securities borrowing transactions of the trading book defaults on its obligations; the FMA shall process these reports in automated form, recording at least the reporting credit institution, type of transaction, counterparty, reporting date and reporting cause; upon request by the European Commission, the FMA may report on these matters to the latter in anonymized form.

(6) The credit institutions shall within five months following the close of each business year communicate to the FMA fundamental data of the foreign credit institutions fully consolidated pursuant to § 59 or § 59 a in the audited group financial statements, using the layout set forth in the Annex*).

**Notifications**

**§ 74.** (1) Credit institutions shall, after the end of each calendar month, transmit without delay monthly reports to the FMA in accordance with the layout provided in the regulation pursuant to para 5.

(2) Credit institutions shall, within four weeks after the end of each quarter of the calendar year, transmit quarterly reports to the FMA which list the items of the profit and loss account at this key-date in accordance with the layout provided for in the regulation pursuant to para 5.

(3) On the basis of the monthly and quarterly reports, the Oesterreichische Nationalbank shall render expert opinions to the FMA regarding compliance with the provisions of §§ 22 through 27 and 29 and the regulations issued thereunder.

(4) In their monthly reports (para 1) the credit institutions shall also list:

1. the amount of each single large exposure, calculated according to § 27 para 2 as well as by applying the weightings referred to in § 27 para 3, and separately the parties liable thereunder;
2. the amounts of open positions pursuant to § 26, as appropriately broken down;
3. the computation of compliance with the provisions on liquidity on the basis of residual maturities as of January 1, 1996.

*) *See* infra pp. 216 et seq.

(5) The FMA shall, by way of regulation, determine the layout of monthly reports and quarterly reports*); when issuing this regulation, it shall take account of the national economic interest in a functioning banking system. It is empowered to wave, by way of regulation, the reporting duty under paras 1, 2, 7 and 8. Regulations of the FMA according to this paragraph require the approval of the Federal Minister of Finance.

(6) Communications pursuant to paras 1, 2, 7 and 8 shall be made in standardized form using electronic transmission or electronic data storage devices. The transmission must comply with specific minimum requirements set by the FMA after hearing the Oesterreichische Nationalbank.

(7) The superordinated credit institution shall, on a quarterly basis, submit to the FMA an assets and trading report of the foreign credit institutions fully consolidated pursuant to §§ 59 or 59a in the audited consolidated financial statements, pursuant to the outline set forth in the regulation.

(8) The superordinated credit institution shall, on a quarterly basis, submit to the FMA an assets and trading report within the meaning of the consolidated financial statements pursuant to §§ 59 or 59a according to the outline set forth in the regulation.

### Reporting of Major Loans

**§ 75.** (1) Any credit and financial institution and any contractual insurance company shall report to the Oesterreichische Nationalbank:

1. the names and addresses of the borrowers to whom they have extended, within the meaning of § 1 para 1 Nos 3, 4, 8, 12 and 16 and para 2 No 1, in total credits or lines of credit or promissory notes of at least 350,000 euro or their euro equivalent; credits within the meaning of this provision are also claims evidenced by securities and the special off-balance sheet financial transactions listed in Annex 2 to § 22**); not, however, the transactions listed in § 22 para 5 No 6 lit a;
2. the amounts of credits or lines of credit granted or of promissory notes, except the special off-balance sheet financial transactions; as well as
3. the group of connected clients pursuant to § 27 paras 4 and 4a, to which borrowers pursuant to No 1 belong; groups pursuant to § 27 para 4 No 1, where the credit institution extending the loan is the group's mother, as well as situations referred to in § 27 para 4 No 2 may be disregarded;
4. The value of the collateral, the amount of the individual value adjustment and the credit rating.

(2) Credits, credit lines and promises extended to the Federation and the States are excepted from the reporting duty under para 1.

(3) The Oesterreichische Nationalbank shall at all times ensure the access of the FMA to the data as set forth in para 1. Upon request of

*) *See* the Second Regulation on Quarterly Reports, BGBl II No 198/2001 and the Sixth Regulation on Monthly Reports, BGBl II No 447/2001.

**) *See* infra p. 168.

1. a credit or financial institution;
2. a contractual insurance company;
3. the Auditing Agency of the Savings Banks' Auditing Association;
4. the cooperative auditing associations;
5. the appointed bank auditors; and
6. the guarantee facilities

the Oesterreichische Nationalbank shall inform the latter of the amounts of reported credits, lines of credit, promissory notes and special off-balance sheet financial transactions of a borrower together with the number of his lenders. Upon request, it shall also furnish to a person entitled to request information referred to in Nos 1 through 6 such data concerning groups of borrowers which form a group of connected clients pursuant to § 27 para 4.

(4) The FMA shall, by way of regulation, determine the appropriate layout for the report with respect to the types of loans as well as time, extent and form of the reports; when issuing the regulation it shall take account of the national economic interest in a functioning banking system.*)

(5) The FMA may communicate information within the meaning of para 3 to the competent authority of a Member State provided that

1. a comparable register of large exposures is kept in that Member State;
2. it is ensured that the Member State concerned supplies the FMA with information to the same extent;
3. the data is used exclusively for the purpose of bank supervision; and
4. the information communicated is subject to the obligation of professional secrecy as defined in Art. 30 of Directive 2000/12/EC.

The communication of such information may also be effected through the European Central Bank. The FMA may commission the Oesterreichische Nationalbank with communicating such information.

(6) Communications pursuant to para 5 shall be made in standardized form using electronic transmission or electronic data storage devices. The transmission must comply with specific minimum requirements set by the FMA after hearing the Oesterreichische Nationalbank.

### State Commissioner

**§ 76.** (1) Unless otherwise provided by statute, the Federal Minister of Finance shall appoint a state commissioner and his deputy for a period not exceeding five years at credit institutions the balance sheet total of which exceeds 375 million euro; reappointment is possible. State commissioners and their deputies act as organs of the FMA and are, in that function, bound exclusively by the FMA's instructions.

(2) Eligible for appointment as state commissioner and his deputy are only physical persons having their main residence in the European Economic Area (EEA) who

*) *See* the Regulation on Reporting Major Loans, BGBl No 772/1993, as amended by BGBl II Nos 31/1997 and 394/1998.

1. neither belong to an organ of the credit institution or to a company of the group of credit institutions concerned nor are dependent upon this institution, and
2. because of their education and their professional career possess the required expertise.

(3) The state commissioner or his deputy shall be recalled from their function by the Federal Minister of Finance if the conditions for the appointment set forth in para 2 no longer exist, or if it is to be assumed that they will no longer adequately perform their duties. The FMA shall without delay report to the Federal Minister of Finance the facts relevant for appointing or recalling state commissioners, in particular information pursuant to para 1 as well as pursuant to §§ 6, 7, 21 and 92.

(4) The state commissioner and his deputy shall be invited by the credit institution in a timely fashion to attend the shareholder meetings, any other meetings of the members, the meetings of the supervisory board and of executive committees of the supervisory board. Upon their request, they shall be allowed to speak at any time. All minutes of the meetings of the above-mentioned bodies shall be transmitted to the state commissioner and his deputy.

(5) The state commissioner or, in the case of his absence or disability, his deputy shall without delay object to resolutions of the bodies mentioned in para 4, which according to their judgment violate statutory or other provisions or rulings of the Federal Minister of Finance or of the FMA and shall report thereon to the FMA. They shall state in their objection which provisions, in their opinion, have been violated by the resolution. The validity of the resolutions shall be suspended by such objection until a decision has been reached by the supervisory authority. The credit institution may, within one week from the time the objection has been raised, request a decision by the FMA. If a decision is not taken within one week after receipt of the request, the objection shall become ineffective. If the objection is sustained, implementation of the resolution shall be prohibited.

(6) Resolutions of a body mentioned in para 4 taken outside a meeting or taken abroad shall at once be communicated to the state commissioner and his deputy. In this case, the state commissioner or, in case of his absence or disability, his deputy may object only in writing within two banking days after the resolution has been served.

(7) The state commissioner and his deputy shall be authorized to inspect the documents and data storage devices of the credit institution to the extent necessary for them to perform the duties set forth in para 5. Records available to the participants of the meetings of the bodies referred to in para 4 shall be communicated to them no later than two banking days prior to the meeting.

(8) The state commissioner and his deputy shall, without delay, report to the FMA any facts which have come to their attention, due to which the fulfillment of the obligations of the credit institution to its creditors and, in particular, the safety of assets entrusted to it are no longer guaranteed. They shall annually submit a written report on their activity.

(9) The Federal Minister of Finance shall grant the state commissioner and his deputy a remuneration (function fee) in proportion to the work and expenses connected with the supervision. The Federal Minister of Finance shall charge a credit institution for which a state commissioner has been appointed an annual lump sum (supervision fee) determined by and payable to the supervisory authority. The supervision fee shall be proportionate to the expenses connected with the supervision.

**International Cooperation and Data Processing**

**§ 77.** (1) The communication of official information by the FMA to foreign bank supervision authorities shall be permitted:

1. if the public order, other substantial interests of the Republic of Austria, banking secrecy and the duty of secrecy in tax matters (§ 48 Federal Tax Act) are not violated thereby;
2. if it is ensured that the requesting state would comply with an Austrian request of the same kind; and
3. if a request for information of the same kind by the FMA would be in accordance with the objectives of this federal statute.

(2) The FMA may at any time seek information concerning the activities of Austrian credit institutions abroad and concerning the situation of foreign credit institutions the activities of which may influence the Austrian banking system, if this is necessary in the national economic interest in a functioning banking system or in the interest of protecting creditors.

(3) The provisions of paras 1 and 2 shall be applied unless otherwise provided in paras 5 through 7 or in international agreements.

(4) Within the scope of its activities under this federal statute, the FMA is empowered to collect and process in a conventional or automated manner the following data within the meaning of the Data Protection Act 2000 – DPA 2000, BGBl I No 165/1999:

1. licenses and the circumstances relevant to their being granted;
2. management, administrative and accounting organization as well as internal control and internal audit;
3. branch offices and the exercise of the freedom to provide services;
4. asset and liability items as well as positions of the profit and loss account;
5. off-balance sheet transactions;
6. special off-balance sheet financial transactions;
7. positions taken into account when consolidating a price, liquidity, interest rate change or securities risk;
8. solvability and own funds;
9. liquidity;
10. foreign exchange positions;
11. large exposures including major loans;
12. qualifying participations pursuant to § 29;
13. consolidation;
14. annual financial statement including notes on the accounts and annual report;

15. monthly report and quarterly report;
16. register of large exposures and comparable facilities abroad;
17. deposit guarantee and investor compensation;
18. measures pursuant to § 70 para 2, the occurrence of overindebtedness or inability to make payments, receivership, bankruptcy and liquidation;
19. reports received from the competent authorities of Member States pursuant to § 2 No 5 and from third countries with whom the Council of the European Union has concluded an agreement pursuant to Art 8 of Directive 92/30/EEC in the context of cooperation pursuant to the Directive provisions or agreements listed in para 5; and
20. information provided pursuant to para 2 or pursuant to a bilateral agreement pursuant to § 77 a.

(5) The providing of information and the transmission of documents including the communication of data listed in para 4 is permitted within the context of administrative assistance as well as to

1. competent authorities of Member States within the meaning of § 2 No 5;
2. competent authorities from a third country with whom the Council of the European Union has concluded an agreement pursuant to Art 8 of Directive 92/30/EEC; and
3. competent authorities of other third countries to the extent the cooperation should also be necessary in the Austrian banking supervisory interest and comply with international standards.

The providing of information and transmission of information pursuant to Nos 1 through 3 is permitted if this should be necessary to fulfill the competent authorities' tasks pursuant to Art 7 para 1 of Directive 77/780/EEC, Art 12 para 2 of Directive 77/780/EEC as amended by Directive 89/646/EEC and Art 7 of Directive 92/30/EEC, each as amended by Directive 95/26 EC, provided, however, that the exchange of information with competent authorities pursuant to Nos 2 and 3 must serve the purpose of fulfilling supervisory duties pursuant to Art 12 of EC Directive 77/780/EEC as amended by Directive 98/33/EC. The competent authorities pursuant to Nos 2 and 3 shall, in addition, be bound by professional secrecy within the meaning of Art 12 of Directive 77/780/EEC. The FMA may, however, communicate information pursuant to para 4 No 19 in all cases only if the competent authority that has transmitted said information expressly consents to such communication.

(6) If the FMA is requested by a competent authority of a Member State or from a third country within the meaning of para 5 Nos 2 or 3 to verify information available to this authority on

1. a credit institution;
2. a financial holding company;
3. a financial institution;
4. an investment firm;
5. an ancillary banking services company;

6. a mixed-activity company; or
7. a subsidiary of a company referred to in Nos 1 through 6

situated in Austria, it may either allow the competent authority of the Member State or the third country to carry out the verification itself, or carry out the verification himself, or, pursuant to § 72 para 1 request other authorities to do so by way of official assistance or commission the Oesterreichische Nationalbank with the verification if the requirements of § 70 para 1 No 3 are met. § 71 shall apply. Furthermore, certified public accountants, bank auditors, the competent audit and internal audit associations or other experts independent from the company to be examined may be instructed to carry out the verification. The competent authority of a third country may be authorized to carry out the verification only in order to fulfill the supervisory functions listed in para 5 and in compliance with professional secrecy.

(7) If the competent authorities

1. of the Member State or
2. of the third country within the meaning of para 5 Nos 2 or 3,

in which the parent company is situated do not themselves conduct the consolidated supervision, official information may also be communicated and agreements pursuant to § 77a may be concluded if information is passed on to those authorities that effectively carry out the consolidated supervision. The passing on of such information as well as the passing on of information referred to in § 77a para 3 No 2 is, however, permitted only if it exclusively serves purposes of consolidated supervision and if a measure of protection of secrecy exists that is comparable to professional secrecy within the meaning of Art 12 of Directive 77/780/EEC.

(8) *(Repealed by federal statute BGBl I No 97/2001.)*

**§ 77a.** (1) Upon proposal by the FMA and after hearing the Oesterreichische Nationalbank, the Federal Minister of Finance may, if authorized to enter into agreements pursuant to Art 66 para 2 of the Austrian Constitution, conclude with competent authorities the following agreements on the procedure of cooperation with the FMA regarding the control and supervision of the credit institutions pursuant to §§ 69 through 71 and 77:

1. agreements with the competent authorities of other Member States;
2. agreements with the competent authorities of third countries pursuant to § 77 para 5 Nos 2 and 3, if the exchange of information with these competent authorities serves the purpose of fulfilling supervisory functions within the meaning of Art 12 para 3 of Directive 77/780/EEC as amended by Directive 98/33/EC and if the competent authorities are bound by professional secrecy within the meaning of Art 12 of Directive 77/780/EEC.

(2) The agreements pursuant to para 1 No 1 shall in particular regulate the cooperation of the FMA with the competent authorities of the Member States with respect to the exchange of information referred to in Art 7 para 1 of Directive 77/780/EEC, Art 12 para 2 of Directive 77/780/EEC as amended

by Directive 89/646/EEC and in Art 7 of Directive 92/30/EEC, each as amended by Directive 95/26/EC.

(3) The agreements pursuant to para 1 No 2 shall in particular regulate:

1. the receipt by the FMA of the information required for the supervision, on the basis of their consolidated financial situation, of the credit institutions or financial holding companies situated in Austria and having as a subsidiary a credit institution or financial institution situated in another third country, or holding a participation in such credit institutions or financial institutions;
2. the information from the competent authorities of third countries required for the supervision of parent companies situated in such third countries and having as a subsidiary a credit institution or a financial institution situated in Austria, or holding participations in such credit institutions or financial institutions; and
3. the conditions and permissibility of the audit of connected companies supervised on a consolidated basis in a treaty state of a credit institution or of a financial holding company having its seat in another treaty state by the competent authority of that treaty state.

(4) If the Council of the European Union has entered into a framework agreement with third countries on the basis of Art 8 of Directive 92/30/EEC, the principles set forth therein shall be taken into account when entering into agreements pursuant to para 3.

## Chapter XV
## Moratorium and International Sanctions

**§ 78.** (1) Should several credit institutions be confronted with difficulties due to events arising from a general political or a general economic development, and if dangers to the entire national economy should result therefrom, in particular in view of § 69 last half-sentence, or to the maintenance of payment transactions, the Federal Government may determine by regulation that all credit institutions

1. in Austria, or
2. in a certain area of Austria

shall temporarily be closed for payment transactions with their customers and may neither make nor receive payments and transfers.

(2) Restrictions pursuant to para 1 may also be decreed only for certain types or for a certain volume of banking transactions.

(3) Regulations pursuant to para 1 shall expire no later than six months after their coming into effect.

(4) If the Federal Government has resolved to issue a regulation pursuant to para 1, the FMA may, in the case of risk in delay, order the credit institutions concerned to neither make nor accept payments and transfers until the regulation referred to in para 1 has become effective. Such order shall be published without delay in the Official Gazette attached to the *Wiener Zei-*

*tung;* it shall expire no later than on the third banking day following such publication.

(5) During the validity of a regulation pursuant to para 1 and an order pursuant to para 4, §§ 86 paras 1, 3, 4 and 5 as well as § 87 para 1 shall be applied to the credit institutions concerned.

(6) The applicability of the Bankruptcy Code and of the provisions of the present federal statute concerning receivership shall not be affected by the provisions of paras 1 through 4.

(7) To the extent necessary in fulfillment of decisions of the United Nations binding under public international law, the Federal Government with the consent of the Executive Committee of the National Council shall be empowered to prohibit by way of regulation the disposition over accounts held with credit institutions if such accounts

1. are the property of authorities or other state agencies of a particular state or of companies having their corporate seat in a particular state, or
2. are the property of companies governed by the authorities, agencies or companies named in No 1 either financially or by way of organization or are otherwise economically controlled by these companies.

In cases in which these conditions are disputed between the credit institution and the owner of the account, the regulation may determine that proof of non-existence of these conditions must be furnished by the owner of the account as far as circumstances in his sphere are concerned and for this reason the credit institution cannot be expected to furnish the respective evidence.*)

(8) The Federal Government shall together with the Main Committee of the National Council designate by regulation those states as non-cooperating states that fail to adopt on their territory or in their jurisdiction the measures against money laundering required under international standards. A violation of international standards shall in particular be assumed if the Council of the European Union or the Financial Action Task Force on Money Laundering has adopted resolutions to this effect.

(9) The following provisions shall apply with regard to non-cooperating states:

1. Persons having their seat or domicile in a non-cooperating state shall, unless the contrary is proven, be in any case deemed to be persons that do not meet the demands made in the interest of a solid and circumspect management of a credit institution.

2. A license pursuant to § 4 may not be issued if one or more persons holding a qualifying participation in the applicant have their seat or domicile in a non-cooperating state, unless the applicant demonstrates that the credit institution is not used for money laundering purposes and no transactions are carried out that breach decisions binding under public international law.

*) *See* Second Regulation on the Blocking of Accounts, BGBl No 285/1994, expired on April 6, 1999 pursuant to BGBl II No 195/1999.

3. The FMA shall prohibit pursuant to § 20 para 3 the acquisition of a qualifying participation in a credit institution by persons having their seat or domicile in a non-cooperating state.

4. The identity registration pursuant to § 40 of customers having their seat or domicile in a non-cooperating state may be made exclusively in the following manner: the customer appears personally at the credit or financial institution and proves his identity by presenting an official original picture identification document. In case of transactions on somebody else's account, this shall apply to the trustee and the trustor; the credit and financial institutions shall make copies of the picture identification document and store them pursuant to § 40 para 3.

5. All transactions

a) the principal or beneficiary of which is a person having its seat or domicile in a non-cooperating state, or

b) that are carried out to or from an account with a foreign credit or financial institution having its seat in a non-cooperating state, shall, if the amount is at least 100,000 euro or the equivalent value in euro, be notified without delay to the authority (§ 6 Security Police Act) by the Austrian credit or financial institution. The reporting duty exists irrespective of whether the transaction is carried out in one step or in several steps evidently connected to each other; if the amount is unknown at the start of the transaction, the report shall be made as soon as the amount is known and it is determined that it is at least 100,000 euro or the equivalent value in euro.

## Chapter XVI
## The Oesterreichische Nationalbank

**§ 79.** (1) The Oesterreichische Nationalbank shall report observations and findings of a fundamental nature or of particular importance in the area of banking to the Federal Minister of Finance and to the FMA and shall, upon request, provide the necessary factual explanations, make supporting documentation available and render expert opinions.

(2) All reports pursuant to §§ 20 and 73 and notifications pursuant to § 74 shall also be communicated to the Oesterreichische Nationalbank within the time limits mentioned in these provisions. The Oesterreichische Nationalbank shall execute for the FMA the automated processing of these reports and notifications as provider of services within the meaning of § 3 No 4 Data Protection Act 2000.

(3) The Oesterreichische Nationalbank shall at all times make available to the FMA automated access to the following data:

1. data pursuant to para 2;
2. data relevant to bank supervision based on reports pursuant to § 44 and § 44 a of the Oesterreichische Nationalbank Act;
3. data relevant to bank supervision in anonymous form on the basis of reports pursuant to the Foreign Exchange Act.

(4) The Oesterreichische Nationalbank shall conduct the examinations entrusted to it pursuant to § 70 para 1 No 3 and § 70 a para 2 on its own ac-

countability and in its own name and shall without delay communicate the results of the examinations to the FMA. The Oesterreichische Nationalbank shall communicate without delay the results of the audits to the FMA; it shall furthermore communicate without delay comments of the credit institution concerned to the FMA. The audit findings of the Oesterreichische Nationalbank shall have the status of expert opinions in the procedure; the commissioning of the Oesterreichische Nationalbank pursuant to § 70 para 1 No 3 and § 70 a para 2 does not hinder, however, a possibly necessary supplementary evidenciary proceeding with own audits of the FMA or accountants or other experts. The Oesterreichische Nationalbank is authorized to provide the bank auditor of the credit institution concerned with the relevant information on the result of audits performed by it.

(5) When carrying out the supervision of the payment system pursuant to § 44 a of the National Bank Act 1984 the Oesterreichische Nationalbank shall not be bound by any instructions.

**§ 80.** (1) The FMA shall communicate to the Federal Minister of Finance and to the Oesterreichische Nationalbank observations of a fundamental nature or of particular importance concerning the field of banking. It shall furthermore transmit to the Oesterreichische Nationalbank all rulings, the knowledge of which is necessary to fulfill the Oesterreichische Nationalbank's statutory duties.

(2) Prior to the issuing of regulations on the basis of this federal statute by the FMA and the Federal Minister of Finance, the Oesterreichische Nationalbank shall be heard.

**§ 81.** *(Repealed by federal statute BGBl I No 97/2001.)*

## Chapter XVII
## Insolvency Provisions

**§ 82.** (1) A proceeding for composition with creditors may not be instituted over the assets of a credit institution. A forced composition with creditors cannot take place in the bankruptcy proceedings of a credit institution.

(2) In receivership and bankruptcy proceedings of credit institutions the FMA shall have standing as a party.

(3) Normally, only the FMA may file for the institution of a bankruptcy proceeding; in case of active receivership, only the receiver may file for bankruptcy. Otherwise § 70 of the Bankruptcy Code shall apply.

(4) A legal person may also be appointed as receiver.

(5) The court shall hear the FMA prior to appointing a receiver or administrator of a bankrupt estate.

(6) The court shall inform the FMA and the Oesterreichische Nationalbank without delay of the imposition of receivership proceedings by transmission of the respective decree.

**§ 83.** (1) Credit institutions that are overindebted or insolvent may, in case the overindebtedness or insolvency is likely to be cured, apply for receivership with the court competent for the initiation of bankruptcy proceedings. Such application may also be made by the FMA through the Legal Representative of the Federation in Financial Matters.

(2) The credit institution shall together with its application present a structured list of its claims and liabilities as well as annual financial statements including notes on the accounts and annual reports of the previous three years.

(3) In the course of preparation of its decision, the court may hear informants and expert witnesses and take other evidence.

**§ 84.** (1) If receivership is ordered, the court shall appoint a physical person or legal person as receiver. This person shall supervise the management of the credit institution. He shall be liable to all persons involved for the damage he causes through negligent exercise of his function.

(2) The receiver has the right to examine the business documents of the credit institution; he shall be invited to meetings of the executive and supervisory bodies and may also convene such meetings. The receiver is entitled to prohibit the implementation of resolutions taken by the bodies of the credit institution.

(3) The court may at any time revoke the appointment of the receiver.

(4) The receiver is entitled to compensation the amount of which shall be determined by the court.

(5) The ordering of receivership and the name of the receiver shall be publicly announced. The court shall cause the ordering of receivership and the name of the receiver to be entered in the commercial register.

**§ 85.** Receivership shall take effect at the beginning of the day following publication of the decree imposing receivership.

**§ 86.** (1) Upon commencement of receivership, all prior claims against the credit institution including claims from bills of exchange and checks which in bankruptcy proceedings would have to be satisfied out of the common bankruptcy estate (§ 50 Bankruptcy Code) as well as related interests and other fees even if they have become due or have accrued only during the receivership, are granted a respite.

(2) Following the ordering of receivership the court shall through expert witnesses determine the financial status of the credit institution at the latter's cost. The receiver shall inform the court in writing of the result of the determination. The report shall indicate whether the credit institution is in a position to meet a specific percentage of liabilities accrued prior to the legal consequences of receivership taking effect. Depending on the report, the court may order that the old claims are subject to notice only with respect to a specific percentage; it may also permit the receiver to entirely satisfy specific old claims to be determined according to type and amount.

(3) During receivership the old claims may neither be secured nor, unless payment in part is allowed (para 2), be paid out or be satisfied in any way.

(4) During receivership no bankruptcy proceedings may be initiated with respect to the property of the credit institution concerning the old claims insofar as a respite has been granted and no court ordered lien or right of satisfaction may be acquired on the property belonging to the credit institution.

(5) The time period by which payment is delayed because of the respite shall not be taken into account when computing the period of prescription and statutory time limits on the filing of suits.

(6) In a bankruptcy proceeding of a credit institution, depositors are entitled to offset their claims against the credit institution's claims.

**§ 87.** (1) If the credit institution with respect to which receivership has been ordered is a cooperative, the shares may neither be legally canceled during receivership nor may the shares and the funds otherwise owed to the retired shareholder by virtue of his cooperative relationship be paid out; notice and liability periods already in progress are tolled.

(2) The credit institution may, if the court upon application of the receiver does not order otherwise, continue its business operation. For the conduct of business which does not belong to its normal business operation, however, the consent of the receiver is required. The credit institution shall, however, also refrain from actions belonging to its normal business operation if the receiver objects. Legal actions taken without the consent or against the objection of the receiver are ineffective vis-à-vis creditors if the third party knew or should have known that they are not part of the normal business operation and that the receiver has not consented or that he has objected to their execution.

(3) The means flowing towards the credit institution out of transactions entered into after the beginning of the receivership (new claims) are to be computed and administered separately; they form – even after receivership has ceased – special funds out of which rights arising from the new claims shall be satisfied on a preferential basis.

**§ 88.** The credit institution may, two years after receivership has ceased, apply for exemption from its obligation of separate computation and administration of the means from new claims if within that period no bankruptcy proceeding has been initiated against it. If such application is made, the court shall examine the financial situation of the applicant. If the result of this scrutiny is that the satisfaction of the new claims is not jeopardized by the exemption, the application shall be granted; as of this point in time the special fund shall be considered dissolved.

**§ 89.** In contentious cases arising from orders of the receiver, the court shall decide by way of a ruling. The court may also seek the necessary information without involving the parties and may ex officio take all evidence it deems necessary for the purpose of making the appropriate determinations.

**§ 90.** (1) The receivership shall cease in case of a ruling of the court as well as upon initiation of bankruptcy proceedings.

(2) The court shall end the receivership if:

1. the conditions which were instrumental for its ordering have ceased to exist, or
2. a year has passed since the ordering of the receivership.

(3) The termination of receivership shall be publicly announced after the ruling on termination has become final. The court shall further cause the termination of receivership to be entered into and the receiver's name to be struck from the commercial register.

(4) If receivership has ceased because of initiation of bankruptcy proceedings or if a bankruptcy proceeding has been initiated because of an application filed within 14 days after the receivership has ceased, all time limits that, pursuant to the Bankruptcy Code, are to be counted backwards starting with the day an application to open a bankruptcy procedure has been filed, shall be computed from the day receivership started.

(5) The credit institution as well as the FMA shall have the right to appeal decisions by which an application for receivership is denied or receivership is terminated. Orders determining the amount of remuneration of the receiver and the cash expenses to be refunded to the latter may be appealed only by the credit institution. Other decisions may not be appealed. No further appeal shall lie against the decisions of the Circuit Court of Appeals.

**§ 91.** (1) The provisions of the Bankruptcy Code shall apply to public announcements.

(2) An inspection of the register of decrees shall be denied if three years have passed since receivership has been lifted. If receivership has lapsed due to the initiation of bankruptcy proceedings, inspection shall be denied only if the inspection period in the bankruptcy proceeding has lapsed as well (§ 14 IEG).

## Chapter XVIII
## Structural Provisions

### Transfer of Assets into Stock Corporations

**§ 92.** (1) Credit institutions organized in the legal form of partnerships of commercial law whose balance sheet total exceeds 730 million euro shall transfer their company or banking enterprise into a stock corporation pursuant to the provisions of the Reorganization Tax Act. Others may choose to do so.

(2) Savings banks, State mortgage banks, the Mortgage Bond Division of the Austrian State Mortgage Banks and cooperatives may transfer their company or banking enterprise into a stock corporation only according to the provisions of the Reorganization Tax Act and by complying with the following provisions.

(3) A transfer pursuant to these provisions is permitted only into:

1. a stock corporation to be formed, if the transferor is the transferee's sole shareholder;
2. a stock corporation conducting banking business and being a member of the same trade association as the transferring credit institution;
3. a stock corporation to be formed, to which several credit institutions that are members of the same trade organization simultaneously transfer their companies or the banking enterprises of the latter.

(4) The effect of the transfer is the legal succession into all rights and obligations. The legal succession extends to the transferred parts of the business and shall take effect when the stock corporation or the capital increase are registered in the commercial register; the legal succession into all rights and obligations shall be registered in the commercial register. Regarding the protection of creditors, § 226 of the Stock Corporation Act shall apply.

(5) The resolution on the transfer shall be passed with the majorities required for mergers by:

1. the board of directors and the savings banks' council of the transferring savings banks;
2. the board of directors and the supervisory board of the State mortgage banks;
3. the board of directors and the administrative council of the Mortgage Bond Division of the Austrian State Mortgage Banks; and
4. the general meeting of cooperatives.

(6) By virtue of the transfer the licenses and authorizations of the transferring credit institution are transferred to the stock corporation. In those instances in which statutes or regulations refer to transferring credit institutions, such references are deemed to be to the stock corporation.

(7) The stock corporation belongs to the same sectoral organization (in particular trade association, statutory auditing association, central institution, sectoral guarantee facility) as the transferring credit institution.

(8) With respect to the transferred banking enterprise, the business object of the transferors is limited to investment management. The activity of their managing bodies is not considered a full time activity. The charter of the stock corporation shall be drafted in accordance with the articles of association of the transferors. The corporate and organizational provisions shall continue to apply to the transferring credit institutions taking account of the disincorporation of the banking enterprise. In those instances in which statutes or regulations refer to savings banks, cooperatives, State mortgage banks or to the Mortgage Bond Division of the Austrian State Mortgage Banks, such references shall continue to apply to the transferring credit institutions.

(9) If they remain in existence, the transferring savings banks, the State mortgage banks, the Mortgage Bond Division of the Austrian State Mortgage Banks and cooperatives are liable with their entire assets for all present and future liabilities of the stock corporation in case the latter should cease its payments; several transferors are jointly and severally liable.

(10) If a state commissioner and his deputy have been appointed to the transferring credit institution, they become commissioner and deputy of the stock corporation upon the latter's registration in the commercial register. Where state commissioners and their deputies have been appointed to several transferring credit institutions, the state commissioner and deputy of the transferee stock corporation shall become commissioner and deputy of the stock corporation upon the latter's registration in the commercial register. Upon registration of the transfer in the commercial register, the commissioners and deputies appointed to the transferring credit institutions shall be recalled by the Federal Minister of Finance.

## Chapter XIX
### Deposit Guarantee and Investor Compensation

**§ 93.** (1) Credit institutions that take deposits requiring a guarantee pursuant to para 2 or carry out investment services that require cover pursuant to para 2 a shall participate in the guarantee facility within the framework of their trade association. If such credit institution fails to participate in the guarantee facility, its authorization (license) for taking deposits requiring guarantee within the meaning of para 2 and for carrying out investment services that require cover according to para 2 a shall expire; § 7 para 2 shall apply.

(2) Deposits requiring guarantee shall mean:

1. deposits pursuant to § 1 para 1 Nos 1 and 12;
2. credit balances which result from funds left in an account or from temporary situations deriving from banking transactions which a credit institution must repay under the legal and contractual conditions applicable; and
3. debts evidenced by a certificate issued by a credit institution, with the exception of mortgage bonds, municipal bonds and funded bank bonds.

(2 a) Investment services that require cover are:

1. the custody business (§ 1 para 1 No 5),
2. the dealing for own or other than own account in investments according to § 1 para 1 No 7 lit b through f, and
3. the third party issuing of securities business (§ 1 para 1 No 11).

Furthermore, all credit institutions which are members of the trade association that avail themselves of the authorization under § 1 para 3 to carry out the investment service business pursuant to § 1 para 1 No 19 lit b shall be members of the guarantee facility.

(3) Each trade association shall maintain a guarantee facility that is obligated to accept all those credit institutions which are members of the trade association that are authorized to take deposits requiring guarantee or to carry out investment services that require cover. The guarantee facilities shall be operated as legal entities in the form of liability companies. The guarantee facilities are obligated to accept all credit institutions and branches of credit institutions pursuant to para 7 that are authorized to take deposits pursuant to para 2 or for the carrying out of investment services that require cover ac-

cording to para 2 a. The guarantee facilities shall, in total, guarantee that in case

1. a member institution enters into bankruptcy;
2. receivership is ordered with respect to a member institution (§ 83);
3. a payment stop is ordered by the competent authority with respect to the guaranteed deposits of a member institution (§ 70 para 2, § 78), or
4. the competent authorities of the home Member State of a credit institution having voluntarily joined for supplementary cover (para 7) have issued the statement on the unavailability of deposits provided for in Annex II lit b to Directive 94/19/EEC,

the deposits shall, up to a maximum amount of 20,000 euro or equivalent value in foreign currency per depositor, be paid out within three months upon the latter's demand and proof of identity; multiple compensation payments may be effected only if guaranteed deposits are placed in nominative joint accounts or if the depositors entitled to the sums held in a nominative account prove their claims. In case deposits are held in a fiduciary account for account of other persons, payment shall be effected according to the rules applicable to multiple compensation payments. Cases of social hardship as well as small deposits in nominative accounts up to an amount of 2,000 euro are to receive preferential timely treatment. If a criminal proceeding within the meaning of para 5 No 3 is pending or if the authority (§ 6 Security Police Act) has been informed pursuant to § 41 para 1, payment shall be suspended pending final resolution of the criminal proceedings or declaration by the authority (§ 6 Security Police Act) that no reason for further prosecution exists; upon clarification of the circumstances, the authority (§ 6 Security Police Act) shall without delay issue this declaration to the guarantee facility concerned. The guarantee facility shall have recourse claims against the credit institution concerned to the extent of the amounts paid and the costs demonstrably incurred. In the circumstances of Nos 2 to 4 supra, a credit institution is obligated to provide the competent guarantee facility with all information necessary for the latter's activity, to put at its disposal records and personnel and to grant the necessary access to electronic data processing facilities. In the situation of No 1 supra, this obligation shall rest on the administrator of the bankrupt's estate. The guarantee facility concerned shall inform the FMA without delay if a member credit institution does not meet its obligations to the facility under this federal statute.

(3 a) Guarantee facilities also have to guarantee that, following a compensation event under para 3 or in the event of a notification by the competent authority in accordance with Annex II lit b of Directive 97/9/EC on the determination or the decision in accordance with Article 2 para 2 of said Directive, claims of an investor resulting from the securities business under para 2 a are, upon request and proof of identity, paid out up to a maximum amount of 20,000 euro or the equivalent amount in foreign currency for each investor within three months following the date on which the amount and the entitlement of the claim have been verified. The provisions of para 3 on nominative joint accounts, fiduciary accounts, pending criminal proceedings

within the meaning of para 5 No 3 and on support and information duties towards the guarantee facility shall apply.

(3b) Guarantee facilities shall indemnify investors for claims resulting from investment services within the meaning of para 2a under the provisions of this Chapter, that resulted from the inability of a credit institution or an investment firm with the meaning of § 9a para 1

1. to pay back monies that are owed or belong to the investors and are being kept for their account in connection with investment services, or
2. to restitute to the investors instruments belonging to them that are being held, kept in custody or administered for their account in connection with the securities business in accordance with the legal and contractual provisions.

(3c) Persons entitled to a claim resulting from investment services may notify the guarantee facility of their claims within a term of one year following the publication of the occurrence of a compensation event under para 3 or the information of the competent authority under Annex II lit b of Directive 97/9 EC on the determination or the decision under Art 2 para 2 of said Directive. The guarantee facility may, however, not refuse compensation to an investor by reference to the term having expired, if the investor was unable to make his claim within this time limit.

(3d) For deposits on accounts that may be compensated under the provisions of this Chapter either as a secured deposit or as a claim resulting from the securities business that requires cover, the guarantee facility shall effect the repartition under No 1 and No 2. There shall be no claim of a creditor for double compensation resulting from the payment of compensation for the same claim under both systems.

1. Monies entrusted to the credit institution or investment firm for the acquisition of instruments shall be attributed to deposit guarantee;
2. Deposits that result directly from the crediting of income, disposal or other settlement of securities transactions shall be attributed to investor compensation.

(4) Concerning claims by creditors other than natural persons, the obligation of the guarantee facility shall, irrespective of the maximum amounts referred to in para 3 and para 3a, be limited to 90% of the guaranteed deposit and 90% of the claims resulting from the securities business. Deposits in an account over which two or more persons are, pursuant to the laws of a Member State or a third country, entitled to dispose as members of a general partnership, a limited partnership, a registered small partnership, a partnership under the Civil Code or a grouping of a similar nature, are to be aggregated and treated as if made by a single depositor for the purpose of calculating the maximum limit referred to in para 3 and when applying the limit of 90%; the same applies to balances and other claims from the securities business. The guarantee facility is entitled to offset compensation claims against a credit institution's counter claims. § 19 para 2 Bankruptcy Act shall apply

whenever guaranteed deposits or claims resulting from the securities business are paid out.

(5) The following deposits and claims resulting from the securities business shall be excluded from cover by the guarantee facility:

1. deposits made by other credit or financial institutions or investment firms on their own behalf and for their own account;

1 a. claims resulting from the securities business of other credit or financial institutions;

2. own funds components pursuant to § 23 irrespective of whether they may be taken into account;

3. deposits and claims arising from transactions in connection with which persons have been finally sentenced in a criminal proceeding for money laundering (§§ 165 and 278 a para 2 Criminal Code);

4. deposits and claims by states and central administrative authorities as well as deposits and claims by regional and municipal territorial entities;

5. deposits and claims by undertakings for collective investment in transferable securities (Directive 85/611/EEC), capital investment companies and capital investment funds as well as deposits and claims by contractual insurance companies as well as pension and retirement funds;

6. deposits and claims by
   a) managers and members of the credit institution's or the investment firm's according to § 9 a para 1 supervisory bodies competent under statute or articles of association and by members of the managing board of credit cooperatives;
   b) personally liable shareholders of credit institutions or investment firms having the legal form of a partnership under commercial law;
   c) depositors and beneficiaries holding at least 5% of the credit institution's or the investment firm's according to § 9 a para 1 capital;
   d) depositors and beneficiaries responsible for carrying out the statutory audit of the credit institution's accounting documents; and
   e) depositors and beneficiaries holding one of the functions referred to in lit a through d in companies connected (§ 244 Commercial Code) to the credit institution or the security firm according to § 9 para 1;

7. deposits and claims by close relatives (§ 72 Criminal Code) and by third parties acting on account of the depositors and beneficiaries referred to in No 6;

8. deposits and claims by other companies connected (§ 244 Commercial Code) to the credit institution or the security firm according to § 9 para 1;

9. deposits and claims for which the depositor or beneficiary has, on an individual basis, obtained from the credit institution or the security firm according to § 9 para 1 interest rates or other financial concessions which have contributed to the deterioration of the credit institution's or the investment firm's according to § 9 para 1 financial situation;

10. bonds issued by the credit institution or the security firm according to § 9 para 1 and liabilities arising from own acceptances and promissory notes;

11. deposits and claims in currencies other than euro. Austrian Schillings, the currency of a Member State or ECUs, provided that this restriction does not apply to instruments pursuant to Part B of the Annex to Directive 93/22/EEC; and
12. deposits and claims by companies which qualify as large corporations within the meaning of § 221 para 3 Commercial Code.

(6) Deposits which a credit institution pursuant to § 10 accepts in a Member State or in a branch office in a third country shall also be guaranteed pursuant to paras 1 through 5. The same applies to claims resulting from investment services that require cover that are rendered according to § 10 in a Member State or in a branch office in a third country. If the deposit guarantee scheme or the investor compensation scheme in this Member State guarantees a higher or more comprehensive cover for deposits and claims than the provisions of paras 1 through 5, only the provisions of this federal statute shall apply to the compensation to be paid by the Austrian guarantee facility.

(7) Credit institutions within the meaning of § 9 para 1 that accept deposits requiring guarantee through a branch office in Austria or render investment services that require cover according to para 2 a and that are members of a deposit guarantee facility within the meaning of Directive 94/19/EEC or of a investor compensation scheme within the meaning of Directive 97/9/EEC in their home Member State may, in order to supplement the deposit guarantee scheme or the investor compensation scheme of their home Member State, join the guarantee facility of the trade association of which they would be members according to their institution type if they were an Austrian credit institution; if they are not associable with a trade association they may voluntarily join the trade association whose members come closest with regard to the category of institution to the credit institution concerned. This supplementary membership shall apply only in respect of the deposits accepted and the investment services requiring cover rendered in Austria and only to the extent that paras 1 through 5 guarantee a higher and more comprehensive level of cover of deposits or claims resulting from investment services than the deposit guarantee scheme or the investor compensation scheme provided in the home Member State of the credit institution. The guarantee facility shall obligate the credit institutions that have voluntarily joined for supplementary cover (§ 9 para 1) with respect to a case of a paying-out of guaranteed deposits or claims resulting from investment services to pay pro rata amounts without delay. When computing the pro rata amounts, § 93 a shall apply. A credit institution having voluntarily joined for supplementary cover may not be treated less favorably than an Austrian credit institution. If a credit institution that has voluntarily joined operates several branch offices in Austria, these shall be considered one branch office for the purpose of computing deposits pursuant to para 2 and claims pursuant to para 2 a as well as and the amounts payable pursuant to § 93 a.

(7 a) Investment firms within the meaning of § 9 a that render investment services that require cover in accordance with para 2 a Nos 1 through 3 in

Austria through a branch may, if they are part of an investor compensation scheme within the meaning of Directive 97/9/EC in their home Member State, in addition to the investor compensation scheme of their home Member State join the guarantee facility of the trade association to which they would belong if they were an Austrian credit institution; in case they cannot be associated to a trade association, then they may join the trade association whose members come closest with regard to the category of institution to the investment firm concerned. § 23 e of the Austrian Securities Supervision Act shall, however, apply to investment firms within the meaning of § 9 a Banking Act that carry out in Austria the investment services business under Section 1 para 1 No 19 lit b Banking Act and whose services do not comprise the holding of funds and securities belonging to their clients, so that the entity rendering the services may never be debtor of its clients. The additional joinder is only valid with regard to the investment services rendered in Austria that require cover according to para 2 a Nos 1 through 3 and only insofar as paras 1 to 5 guarantee cover of a higher scope or amount as the investor compensation scheme of the home Member State of the investment firm. The guarantee facility shall obligate the voluntarily joining investment firm to pay proportionate contributions for the event of a payment of secured claims for investment services. § 93 b shall apply mutatis mutandis to the assessment of proportionate contributions. Voluntarily joining investment firms shall not be treated worse than an Austrian credit institution comparable in terms of category of institution and business activity. If a voluntarily joining investment firm has several branches in Austria, then these branches shall be considered as one branch for the purpose of the assessment of claims under para 2 a and the assessment of contributions under § 93 b.

(8) Credit institutions within the meaning of paras 1 and 7 that accept deposits requiring cover in Austria shall inform the investment seeking public through a display in the cashier's hall of the provisions of this federal statute applying to the guarantee of deposits as well as, if applicable, on the provisions of the home Member State or a third country, if the deposits accepted by a branch office of a foreign credit institution are guaranteed according to the provisions of this third country. Each depositor needs to be presented with written information in German and at no cost at the beginning of the business relationship or, at the latest, upon conclusion of the agreement, that contains easily understandable information on the guarantee facility to which the credit institution is a member and on amount and scope of cover. Upon request of the depositor, detailed written information on the guarantee facility shall be handed out at no cost. The duty to hand out said information to depositors also applies to credit institutions that accept deposits requiring guarantee under the freedom to provide services.

(8 a) Credit institutions within the meaning of paras 1 and 7 that render investment services in Austria that require cover and investment firms within the meaning of para 7 a shall inform the investment seeking public through a display in the cashier's hall of the provisions of this federal statute regarding investor compensation and, if applicable, of the provisions of

the home Member State or of the third country, if investment services rendered by a branch office of a foreign credit institution or a foreign investment firm are subject to a compensation scheme according to the provisions of this third country. At the beginning of a business relationship, or at the latest upon conclusion of an agreement regarding investment services requiring cover, each investor needs to be presented at no cost with written information in German that contains easily understandable information on the compensation scheme to which the credit institution or the investment firm is a member, and on the amount and scope of cover. Upon request of the investor, detailed written information on the investor compensation scheme shall be handed out to the investor at no cost. The duty to hand out said information to investors also applies to credit institutions or investment firms that render investment services under the freedom to provide services.

(9) If a credit institution which voluntarily joined for supplementary cover does not comply with its obligations, the guarantee facility concerned shall without delay inform the FMA. The FMA shall, simultaneously notifying the competent authority of the home Member State, request the credit institution having voluntarily joined for supplementary cover to comply with its obligations. If those measures fail to secure compliance of the credit institution having voluntarily joined for supplementary cover, it may, with the consent of the competent authority of the home Member State, be excluded from the guarantee facility, having been given twelve months' notice. The previous provisions also apply to investment firms that joined voluntarily for supplementary cover. Deposits made before the date of exclusion shall continue to be covered by the voluntary scheme until the dates on which they fall due. Investment services rendered before the date of exclusion shall continue to be covered by supplementary cover. Depositors and investors shall be informed by the guarantee facility of the withdrawal of the supplementary cover by way of publication in the Official Gazette attached to the *Wiener Zeitung* and in at least one nationwide and daily published newspaper. The excluded institution shall display the notice of withdrawal of the supplementary cover in the cashier's hall and refer to it explicitly in its advertising and contractual documents.

(10) Credit institutions that open branch offices in another Member State by way of the freedom of establishment are, with respect to the deposits within the meaning of para 7 and the rendered investment services within the meaning of para 7 a, accepted in that Member State, likewise authorized to voluntarily join for supplementary cover a deposit guarantee and investor compensation system operative in that Member State. The FMA shall, in a guarantee case within the meaning of para 3 Nos 1 though 3, issue the declaration on the unavailability of deposits and (or) the information provided for in Annex II lit b of Directive 94/19/EEC to the competent authority of the host Member State.

(11) The use in advertising of membership in a deposit guarantee scheme is restricted to a factual reference to the deposit guarantee scheme of which the credit institution is a member.

**§ 93a.** (1) The guarantee facilities shall obligate their member institutions with respect to a case of paying-out of guaranteed deposits or of compensation for covered investment services, to pay pro rata amounts without delay. The guarantee facilities shall adopt organizational measures allowing for immediate assessment and payment of the guaranteed claims. Unless para 4 applies, the duty to contribute pro rata shall at first and irrespective of para 2 apply only to member institutions of the guarantee facility of the trade association concerned. The contributions of the member institutions shall be calculated in case of the paying out of guaranteed deposits according to the share of guaranteed deposits (§ 93 paras 2 through 5) in the sum total of all guaranteed deposits (§ 93 paras 2 through 5) as of the preceding balance sheet date. In case of the paying-out of compensation for covered investment services, the calculation is carried out pursuant to § 93b. In a given business year the member institutions shall, however, be obligated to make contributory payments of no more than 0.83% of the assessment basis pursuant to § 22 para 2, if applicable adding the positions of the securities trading book weighted pursuant to § 22 para 2, on the latest balance sheet date; in case of a repeated payment obligation within a term of five business years, the assessment basis pursuant to § 22 para 2 shall be reduced by the amounts already paid multiplied by 40; this shall apply by analogy to credit institutions and investment firms having joined voluntarily for supplementary cover pursuant to § 93 paras 7 and 7a. Member institutions shall to the same extent be liable for court adjudicated tort claims against the guarantee facility; this shall apply by analogy to credit institutions and investment firms having joined voluntarily for supplementary cover pursuant to § 93 paras 7 and 7a.

(2) If the guarantee facility cannot fully pay out guaranteed deposits or claims, the guarantee facilities of the other trade associations shall be obligated to make without delay pro rata contributory payments in order to cover the missing amount. When calculating the shares, para 1 and § 93b shall apply by analogy. Such guarantee facilities shall have recourse claims against the guarantee facility concerned, to the extent of the amounts paid and the costs shown to have been incurred.

(3) If the guarantee facilities are, in total, unable to fully pay out the guaranteed deposits (claims), the first-concerned guarantee facility shall, in order to satisfy the remaining payment obligations, issue bonds for which the Federal Minister of Finance may, in accordance with special statutory authorization, accept liability on behalf of the Federation.

(4) In case guaranteed deposits or claims by

1. a credit institution having joined voluntarily for supplementary cover pursuant to § 93 para 7;

1a. an investment firm having joined voluntarily pursuant to § 93 para 7a;

2. a credit institution which received its license after June 30, 1996; or

3. a credit institution which changes membership in the trade association after June 30, 1996

are paid out, all guarantee facilities shall without delay make pro rata contributory payments. When calculating the shares, para 1 and § 93b shall apply by

analogy. The institutions are obligated to communicate to the guarantee facility of their trade association all information which the latter requires to fulfill its duties. The guarantee facilities are entitled to exchange the information needed to fulfill their duties. Institutions pursuant to Nos 1 through 3 shall, for a period of 5 years starting with their voluntary joining for supplementary cover according to para 7 or 7a, the granting of the license, or the change of membership in the trade association, belong to a separate accounting division within their guarantee facility. After five years, membership in the separate accounting division shall expire; in case cover must be provided after this period, the provisions of this paragraph shall no longer apply; instead, the provisions of para 1 shall apply.

(5) Para 4 shall not apply if the competent guarantee facility should decide to waive application of the five year period of para 4 to the institution within the meaning of para 4 Nos 1 through 3. Credit institutions within the meaning of para 4 No 2 may by majority decision of the owners also be allowed to join the guarantee facility of the trade association of which the majority of the owners are members; in this case the consent of the guarantee facility of the trade association of which these owners are members must also be obtained.

(6) Apart from paying out deposits (claims) requiring guarantee (cover) according to the aforementioned provisions, guarantee facilities may, with the consent of their member institutions, contribute to the rescue of institutions which find themselves in financial difficulties. Regarding the consent, the majority requirements of § 42 para 1 Composition with Creditors Act shall apply with the proviso that the amounts that have to be paid in the guarantee case replace the claims. In case of a rescue of a institution within the meaning of para 4 Nos 1 through 3, the consent of all guarantee facilities is required for the duration of membership in the separate accounting division; sentence two shall apply to the decision-making within the individual guarantee facilities.

(7) All guarantee facilities shall cooperate within the framework of an early warning system and shall exchange the information required therefore; para 4 shall apply by analogy to the communication and exchange of this information. All institutions connected to a guarantee facility shall provide the latter with the information necessary for operating the early warning system.

(8) The guarantee facilities shall:

1. submit their annual financial statements to the FMA and to the Oesterreichische Nationalbank no later than six months following the close of the business year, and
2. notify without delay the FMA of an institution leaving the guarantee facility.

(9) The guarantee facilities shall cooperate with the guarantee and investor compensation schemes of Member States according to Annex II of Directive 94/19/EC and Annex II of Directive 97/9/EC. Credit institutions within the meaning of § 9 para 1 and investment firms within the meaning of § 9a para 1 that take deposits or render investment services that require cover in Austria through a branch office shall provide the competent guaran-

tee facility of the home Member State with all information which the latter requires to ensure that the depositors (investors) are immediately and properly compensated.

**§ 93b.** (1) The following paras 2 to 5 shall apply to the assessment of claims within the meaning of § 93 para 3b that have been made within the meaning of § 93 para 3c, for the calculation of the contributions of member institutions and the paying out of compensation payments.

(2) The amount of the claim shall be assessed in accordance with the market value of the instruments at the date of the occurrence of a guaranteed event within the meaning of § 93 paras 3 and 3a. The claim shall also include interest payments and dividends that accrued in the period between the occurrence of a guaranteed event (§ 93 paras 3 and 3a) and the paying out of compensation.

(3) The trustee appointed pursuant to § 23 para 7 Custody Act shall provide the guarantee facility with all information required for the assessment of the amount of compensation claims, and co-operate with the guarantee facility. The trustee shall in particular inform the guarantee facility of the composition and the amount of the separate assets under § 23 para 6 of the Custody Act.

(4) The guarantee facility shall immediately following the end of the filing period collect from the member institutions contributions to cover compensation claims. The amount of the contributions of member institutions for the payment of compensation for investment services shall be determined in proportion to the amount of the commission proceeds contained in Annex 2 to Section 43, Part 2, Position 4 of a particular member institution to the overall commission proceeds of all member institutions at the end of the business year.

(5) In case there should be an extraordinary impediment to the assessment of the claims or the collection of the compensation assets, or if the trustee appointed according to § 23 para 7 Custody Act should notify that there are extraordinary impediments to the assessment of the amount of the separate assets under § 23 para 6 Custody Act as a result of which the time limit set forth in § 93 para 3a cannot be met, then this time limit shall be extended for a further three months. Upon request of the guarantee facility concerned, the Federal Minister of Finance is, after hearing the FMA and the Oesterreichische Nationalbank, further entitled to grant an extension of three months if this should be required to prevent economic hardship, particularly dangers to the stability of the financial system.

**§ 93c.** The provisions of §§ 93 through 93b shall, in the case of credit institutions pursuant to § 1 para 1 and § 9 and investment firms pursuant to § 9a, whose license or authorization to receive deposits requiring a guarantee or to carry out investment services requiring cover has been withdrawn or whose respective license or authorization has lapsed, apply to all deposits and claims received up until the date on which the license or authorization has lapsed or has been withdrawn, even if the compensation event pursuant to § 93 para 3 Nos 1 through 4 has materialized after such license of authoriza-

tion has lapsed or has been withdrawn. Such institutions have to fulfill all obligations towards the guarantee facility referred to in §§ 93 through 93 b, irrespective of the withdrawal or lapse of the license or authorization.

## Chapter XX
## Protection of Designations

**§ 94.** (1) The designations *"Geldinstitut"* (money institution), *"Kreditinstitut"* (credit institution), *"Kreditunternehmung, Kreditunternehmen"* (credit company), *"Bank"* (bank), *"Bankier"* (banker) or any designation in which one of these words is contained may – unless otherwise provided by statute – be used only by companies authorized to conduct banking business, unless the company is exclusively authorized to conduct financial services business pursuant to § 1 para 1 No 19. Companies that are exclusively entitled to conduct the exchange bureau business may, however, only designate themselves as *"Wechselstuben"* (exchange bureaus).

(2) The designation *„Sparkasse"* (savings bank) or any designation containing the word *„Sparkasse"* (savings bank) may only be used by those credit institutions to which the Savings Banks Act applies, as well as by the Österreichische Postsparkasse Aktiengesellschaft. Savings banks that have transferred their company or banking enterprise pursuant to § 92 into a stock corporation may use the designation *„Sparkasse"* (savings bank) only in connection with an addition indicating the outsourcing of the banking business. Savings banks may also use the name *„Sparkasse"* (savings bank) with an addition indicating the type of savings bank, its guarantor, its corporate seat or its business area as well as, if applicable, the date or special circumstances of its establishment.

(3) The designation *"Finanzinstitut"* (financial institution) or *"Finanz-Holdinggesellschaft"* (financial holding company), *"Wertpapierfirma"* (investment firm) or a designation in which one of these words is contained is exclusively reserved for financial institutions and financial holding companies and investment firms within the meaning of this federal statute.

(4) The designation *"Volksbank"* (People's Bank) or a designation in which this word is contained is exclusively reserved for the institutions of this sector.

(5) The designation *"Bausparkasse"* (housing construction savings and loan association) or a designation in which this word is contained shall be exclusively reserved for the credit institutions entitled to conduct the housing construction savings and loan business. Words which contain the root *"Bauspar"* (housing construction savings or loan) may only be used by credit institutions that are entitled to:

1. conduct the housing construction savings and loan business, or
2. accept as trustees savings deposits for a savings and loan association; credit institutions pursuant to No 2 may use words with the root *"Bauspar"* (housing construction savings or loan) only to such extent as they are thereby not conveying the appearance of conducting the housing construction savings and loan business.

(6) The designation *"Raiffeisen"* or any designation in which this word is contained shall be exclusively reserved for the institutions of this sector.

(7) The designation *"Landeshypothekenbank"* (State mortgage bank) or a designation in which this word is contained shall be exclusively reserved for the State mortgage banks and for the Mortgage Bond Division of the Austrian State Mortgage Banks.

(8) The designations protected pursuant to paras 1 through 7 may also be borne and used by facilities of credit and financial institutions as well as by companies, if they were permitted to do so when this federal statute came into effect, or if this occurs in a context which precludes the appearance that they are conducting banking business or business of a financial institution.

(9) Para 2 shall not apply insofar as housing construction savings and loan associations use the word *„Bausparkasse"* (housing construction savings and loan association) or credit cooperatives use the designation *„Spar- und Vorschußkasse"* (savings and cash advance association) or *„Spar- und Darlehenskasse"* (savings and loan association) in their respective commercial name.

(10) Credit and financial institutions within the meaning of §§ 9 paras 1, 11 or 13 that conduct business in Austria through a branch office or by way of the freedom to provide services may carry their commercial names irrespective of paras 1 through 9; if they carry their commercial name in a version translated into German, the commercial name shall be added in the original language.

## Chapter XXI
## Savings Associations and Employee Savings Banks

**§ 95.** (1) Notwithstanding para 2, associations within the meaning of the Associations Act 1951 and of the Associations Charter 1852 are not permitted to conduct banking business. Savings associations may accept moneys from their members only if these moneys are deposited without delay in a credit institution in the name and for the account of the individual members.

(2) Associations founded pursuant to the Associations Charter 1852 which at the date of entry into force of this federal statute are permitted to conduct banking business pursuant to the previous statutory provisions and to their articles of association may, in deviation from para 1, continue to do so. The provisions of this federal statute concerning credit cooperatives shall apply to these associations.

(3) Special savings facilities created within an enterprise which accept deposits of the enterprise's own employees and for which the employer as such is liable (employee savings banks) shall be prohibited. Employers may only accept moneys from their employees if such moneys are, without delay, deposited in a credit institution in the name and for the account of the individual employees.

(4) The conducting of the deposit business shall be prohibited if a predominant number of depositors is legally entitled to receive loans or goods on credit out of such deposits (special purpose savings enterprise); this shall not

apply to housing construction savings and loan associations as concerns the housing construction savings and loan business conducted by them.

## Chapter XXII
## Procedural and Punitive Provisions

**§ 96.** As to the execution of a ruling pursuant to this federal statute the amount of 20,000 euro shall replace the amount of 10,000 Schillings provided for in § 5 para 3 of the Administrative Enforcement Act. The execution of such rulings by means of monetary fines as coercive penalties shall also be permissible against legal entities organized under public law.

**§ 97.** (1) The FMA shall charge the credit institutions interest on the following amounts and at the following rates:

1. 2% on the amount by which they remain under the required amount of own funds pursuant to § 22 para 1 in connection with § 103, computed on an annual basis, for 30 days, except in case of supervisory measures pursuant to § 70 para 2 or in the case of overindebtedness of the credit institution;
2. 5% above the applicable banking rate on the amount by which they remain below the liquid funds of the first degree pursuant to § 25 para 7, computed on an annual basis, for 30 days; the amounts by which the credit institution remains under its minimum reserve obligation (Art 5 Regulation (EC) No 2818/98 of the European Central Bank on the application of minimum reserves, OJ No L 356 of 30 December 1998) shall be deducted from the deficit in liquid funds of the first degree;
3. 2% on the amount by which they remain under the prescribed amount of liquid funds of the second degree pursuant to § 25 para 12, computed on an annual basis, for 30 days;
4. (*Repealed by federal statute BGBl I No 33/2000);*
5. 0.5% on the amount exceeding the open term positions pursuant to § 26a paras 2 and 3, computed on an annual basis, for 30 days, except in case of supervisory measures pursuant to § 70 para 2 or in the case of overindebtedness of the credit institution;
6. 2% on the amount exceeding the limits on large exposures pursuant to § 27 para 7, computed on an annual basis, for 30 days.
7. *(Repealed by federal statute BGBl No 753/1996.)*

(2) Interest to be paid according to para 1 shall be remitted to the Federation.

**§ 98.** (1) Whoever conducts banking business without the necessary authorization commits, unless the act constitutes a criminal offense to be punished by the courts, an administrative offense and shall be punished by the FMA with monetary penalty of up to 20,000 euro.

(2) Whoever, as a responsible person (§ 9 Administrative Penalties Act) of a credit institution:

1. fails to provide to the FMA written notification pursuant to § 10 para 5 of changes in the conditions of the information to be provided pursuant to § 10 para 2 Nos 2 through 4 and para 4 No 2;
2. fails to provide to the FMA notification of the activities listed in Nos 1 through 14 of the Annex of Directive 89/646/EEC pursuant to § 10 para 6;
3. fails to provide to the FMA written notification of any acquisition or assignment within the meaning of § 20 paras 2 and 4 pursuant to § 20 para 5;
4. fails to provide to the FMA written notification pursuant to § 20 para 5 of the identity of any stockholders or other shareholders holding qualifying participations as apparent, in particular, from information received at the annual general meeting of stockholders or other shareholders or as a result of compliance with §§ 91 through 94 of the Stock Exchange Act;
5. fails to provide the superordinate credit institution with all information necessary for consolidation pursuant to § 30 para 7;
6. violates the duties pursuant to §§ 40 and 41 paras 1 through 4;
7. fails to provide to the FMA immediate written notification of the circumstances listed in § 73 para 1 Nos 1 through 11 and para 3;
8. fails to submit reports within the required time limits or in compliance with the statutory or regulatory form requirements or repeatedly submits incorrect or incomplete reports within the meaning of § 74 to the FMA or to the Oesterreichische Nationalbank;
9. fails to meet its obligation to report major loans pursuant to § 75; or
10. impermissibly advertises membership in a guarantee scheme (§ 93 para 11),

commits, unless the act constitutes a criminal offense to be punished by the courts, an administrative offense and shall be punished by the FMA with monetary penalty of up to 20,000 euro.

(3) Whoever as a responsible person (§ 9 Administrative Penalties Act) of a credit institution:

1. fails to conspicuously publish the annual interest rate of a savings deposit pursuant to § 32 para 6 in the savings document;
2. fails to enter changes in the annual interest rate together with the day on which they take effect pursuant to § 32 para 6 into the savings document when it is next presented;
3. disregards the written form requirement when entering into consumer credit agreements (§ 33 para 2) and consumer current account agreements (§ 34 para 2);
4. concludes consumer loan contracts that do not contain the information required by § 33 para 2 Nos 1 through 5;
5. concludes consumer loan contracts with revolving credit lines that do not contain the information required by § 33 para 3;
6. fails to communicate in writing changes in the real and fictitious annual interest rates prior to their taking effect;

7. fails to provide to the Federal Minister of Finance immediate written notification of the circumstances listed in § 73 para 1 Nos 1 through 12;
8. concludes consumer current account contracts that do not contain the information required by § 34 para 2;
9. fails to communicate the quarterly account status required by § 34 para 4;
10. fails to display in the cashier's hall the information required by § 35 para 1 and § 103 No 32 or fails to inform the depositors;
11. advertises his willingness to extend loans within the meaning of § 35 para 2 without indication of the effective and fictitious annual interest rate; or
12. breaches the duties of diligence set forth in § 36,

commits, unless the act constitutes a criminal offense to be punished by the courts, an administrative offense and shall be punished by the FMA with monetary penalty of up to 2,000 euro.

(4) Whoever as a responsible person (§ 9 Administrative Penalties Act) of a credit institution violates the prohibition to dispose over accounts under § 78 para 7 commits, even if he does so only negligently, an administrative offense and shall be punished by the FMA with deprivation of freedom up to six weeks or with monetary penalty of up to 35,000 euro, unless the act constitutes a criminal offense to be punished by the courts.

**§ 99.** Whoever

1. as a responsible person (§ 9 Administrative Penalties Act) of a financial institution fails to communicate to the FMA the information pursuant to § 12 para 3 or the notification pursuant to § 12 para 5;
2. as a responsible person (§ 9 Administrative Penalties Act) of a financial institution fails to communicate to the FMA the information pursuant to § 14 para 3 or the notification pursuant to § 14 para 5;
3. intends to directly or indirectly hold a qualifying participation in a credit institution and fails to communicate this in advance to the FMA, indicating the amount of this participation pursuant to § 20 para 1;
4. fails to inform the FMA in advance and in writing pursuant to § 20 para 2 of his intent to increase his qualifying participation in a credit institution in such a manner that the thresholds of 20%, 33% or 50% of the voting rights or the capital are reached or exceeded or that the credit institution becomes his subsidiary;
5. fails to inform the FMA in advance and in writing pursuant to § 20 para 4 of his intent to relinquish his qualifying participation in a credit institution or to drop below the thresholds for participations in a credit institution mentioned in § 20 para 2;
6. as a responsible person (§ 9 Administrative Penalties Act) of a subordinated institution or of a superordinate financial holding company fails to provide the superordinate credit institution with all information necessary for consolidation pursuant to § 30 para 7;

6a. as a responsible person (§ 9 Administrative Penalties Act) of a mixed activities company or of its subsidiary fails to provide the credit institution with all information pursuant to § 70a para 1;

7. without being authorized uses the designations *"Sparbuch"* (savings book), *"Sparbrief"* (savings certificate) or *"Sparkassenbuch"* (savings bank book) in violation of § 31 para 2;

8. as a responsible person (§ 9 Administrative Penalties Act) of a financial institution violates the duties under §§ 40 and 41 paras 1 through 4;

9. as a trustee fails to meet his disclosure duties under § 40 para 2 or § 103 No 24;

10. as bank auditor contrary to § 63 fails to report without delay – respectively, in case of minor shortcomings that can be remedied on short notice, after a time limit not exceeding 3 months set by the bank auditor has expired without the credit institution having remedied the exposed shortcoming – facts determined by him, on the basis of which he judges that the functioning of the credit institution or the fulfillment of its obligations is no longer guaranteed or that legal or other provisions instrumental to the banking supervision or rulings of the FMA or of the Federal Minister of Finance have been violated, together with his comments in writing to the FMA and to the Oesterreichische Nationalbank; or fails to provide notification if the managers fail to supply within the time limit set by the bank auditor information requested by the latter;

11. as a responsible person (§ 9 Administrative Penalties Act) of a representation fails to meet within one month his reporting obligations under § 73 para 2;

12. as a responsible person (§ 9 Administrative Penalties Act) of a financial institution or a contractual insurance company fails to meet his reporting obligation of major loans pursuant to § 75;

13. as a responsible person (§ 9 Administrative Penalties Act) of a guarantee facility fails to submit to the FMA the annual financial statement of the guarantee facility pursuant to § 93a para 8 within six months after the end of the business year;

14. as a responsible person (§ 9 Administrative Penalties Act) of a guarantee facility fails to notify the FMA of a credit institution leaving the guarantee facility pursuant to § 93a para 8;

15. without authorization and in violation of § 94 uses the designations *"Geldinstitut"* (money institution), *"Kreditinstitut"* (credit institution), *"Finanzinstitut"* (financial institution), *"Finanz-Holdinggesellschaft"* (financial holding company), "Wertpapierfirma" (investment firm), *"Kreditunternehmung", "Kreditunternehmen"* (credit company), *"Bank"* (bank), *"Bankier"* (banker), *"Sparkasse"* (savings bank), *"Bausparkasse"* (housing construction savings and loan association), *"Volksbank"* (people's bank), *"Landeshypothekenbank"* (State mortgage bank), *"Raiffeisen",* or any designation in which one of these words is contained;

16. as a responsible person (§ 9 Administrative Penalties Act) of a financial institution or as an auditing body under § 230a Civil Code violates the provisions of § 230a Civil Code on cover funds (§§ 66 through 68);

17. contrary to directly applicable provisions of EU law makes dispositions over accounts without the disposition being an administrative offense according to the Foreign Exchange Act; or
18. contrary to § 31 para 5 contractually transfers or acquires savings documents with respect to which an identity registration pursuant to § 40 para 1 has not yet occurred,

commits, unless the act constitutes a criminal offense to be punished by the courts, an administrative offense and shall be punished by the FMA with monetary penalty of up to 20,000 euro.

**§ 99 a.** (1) If despite the implementation of measures pursuant to § 99 No 6 in connection with § 96 a financial holding company in its capacity as superordinate institution fails to communicate to the superordinate credit institution all information and data required for consolidation referred to under § 30 paras 7 and 8, the FMA may, if this purpose cannot be accomplished by other measures, apply to the competent courts of first instance in commercial matters at the seats of the subordinated institutions for an order of suspension of the voting rights attaching to the stock and other shares in these subordinated institutions held by institutions belonging to the group.

(2) If a court orders the suspension of the voting rights pursuant to para 1 it shall at the same time appoint and transfer the exercise of the voting rights to a trustee who has to meet the requirements of § 5 para 1 No 3. The voting rights of the stakeholders shall be suspended until acknowledgment by the court that the prerequisites of para 1 no longer exist. The FMA shall be informed thereof.

(3) The trustee is entitled to reimbursement of his expenses and compensation for his activity the amount of which shall be determined by the court. The financial holding company and the subordinated institution concerned are jointly and severally liable therefore. They may appeal resolutions determining the trustee's compensation and expenses to be reimbursed to him. No further appeal shall lie against the decision of the Court of Appeals.

**§ 99 b.** The administrative offenses referred to in §§ 98 and 99 shall be subject to a prescription period of 18 months instead of the six month period established in § 31 para 2 Administrative Penalties Act.

**§ 100.** (1) Whoever conducts banking business without the necessary authorization shall not be entitled to any compensation connected with such business, such as, in particular, interest and commissions. The legal invalidity of agreements connected with these businesses does not entail the legal invalidity of the entire banking transaction. Agreements to the contrary as well as sureties and guarantees relating to such transaction are without legal effect.

(2) Whoever conducts banking business without the required license may not rely on § 1 para 5.

**§ 101.** (1) Whoever discloses or exploits facts subject to banking secrecy for the purpose of securing a profit for himself or another or in order to cause a disadvantage to another shall be punished by the court with deprivation of freedom up to one year or with monetary penalty up to 360 day fines.

(2) The offender under para 1 shall be prosecuted only upon the request of the person whose secrecy interest has been violated.

## Chapter XXIII
## Transformation and Redemption of Participation Capital

### Transformation of Participation Capital

**§ 102.** (1) Holders of participation certificates (§ 23 para 4) of a stock corporation may be granted the right to exchange their participation capital for stock. §§ 146, 149 para 2, 153 and 160 Stock Corporation Act as well as § 2 paras 3 through 5 and § 3 para 1 Capital Adjustment Act shall apply. The resolution shall establish:

1. the exchange rate (in case of a transformation to nominal value stock *(Nennwertaktien)* nominal amounts, and in case of a transformation to piece stock *(Stückaktien),* the total capital/individual share ratio may not be weighted differently);
2. additional payments, if applicable;
3. the maximum amount of the contingent capital increase resulting from No 1;
4. the time limit within which the right of exchange may be exercised (the right of exchange may also be granted without time limit);
5. the type of stock (in exchanges for preferential stock, § 115 para 2 Stock Corporation Act shall be taken into account); and
6. information concerning the exercise and the modalities of the right of exchange.

(2) If the period during which the right of exchange may be exercised is limited pursuant to para 1 No 4, the managing board may, with the consent of the supervisory board, upon expiration of this period decide that the opportunity to exchange determined pursuant to para 1 will be extended.

(3) Resolutions pursuant to paras 1 and 2 shall be submitted pursuant to §§ 162 and 163 of the Stock Corporation Act for registration in the commercial register and shall be published. §§ 164 and 168 of the Stock Corporation Act shall apply.

(4) § 23 para 4 Nos 1 and 2 shall not apply to participation capital transformed pursuant to paras 1 and 2. The transformation right granted pursuant to the aforementioned provisions shall be considered adequate compensation for holders of participation certificates pursuant to § 23 para 5 first sentence.

(5) § 3 para 1 Nos 7 and 8 and para 2 Capital Market Act and § 75 para 2 No 2 Stock Exchange Act shall apply with respect to the duty to publish a prospectus for the shares to be exchanged.

(6) Resolutions on the transformation which have already been passed by the shareholders' meeting shall remain valid following conversion to shares without nominal value, if the conversion ratio remains unchanged.

**Redemption of Participation Capital**

**§ 102 a.** (1) Participation capital may be redeemed by the credit institution pursuant to the following provisions. The redemption shall apply to the entire participation capital; participation capital pursuant to § 23 para 1 No 5 may be treated separately from participation capital pursuant to § 23 para 3 No 8.

(2) The resolution on the redemption shall be passed by the credit institution's body that is competent for the redemption of participation capital with the majorities necessary for the issuance of participation capital.

(3) In case the credit institution is a stock company with stock exchange listed shares and participation certificates, the redemption must be preceded by an exchange offer in shares (§ 102) within six months prior to the notification of the redemption. The notification of the exchange offer shall include a reference to the intended redemption. The exchange offer may not set a premium, if any, that is higher than the difference between the average stock exchange price of the relevant share and the average list price of the participation certificates on the 20 stock exchange days preceding the resolution on the exchange offer.

(4) The participation capital must be redeemed in cash by the credit institution. The redemption of participation capital, to the extent it is not held by the credit institution itself, shall occur at the average list price of the participation shares on the 20 stock exchange days preceding the resolution on the redemption, rounded up to 0.1 euro. If the participation capital is not stock exchange listed, the holder of participation capital shall be paid an adequate redemption in cash. In this case § 2 para 3 Transformation Act shall apply by analogy with respect to the reports to be drawn-up, the audits, and the legal means of recourse of those entitled to redemption; the redemption plan substitutes for the transformation plan.

(5) Upon publication of the resolution referred to in para 2, the participation capital is redeemed, thereby, the owner of participation capital exclusively has the right to a cash payment pursuant to para 4. The notice shall make a reference to the redemption rights of the holders of participation capital. Certificates issued on participation capital shall be retained by the credit institution.

(6) If the settlement amount for participation capital cannot be credited to an account or in case the holder of participation capital does not dispose of the settlement amount, the settlement amount shall be remitted to a fiduciary appointed at the resolution of the redemption. The fiduciary is responsible for further execution of the transaction. He may therefore seek the support of the credit institution.

(7) The participation capital shall be redeemed against the profit derived from the annual accounts or a free reserve. The participation capital pursuant to § 23 para 4 and the restricted reserve resulting from the share

premium from the issuance of participation capital shall, depending on the legal form of the credit institution, be transferred to the legal reserve, the security reserve, or the statutory reserve.

(8) The bank auditor shall certify the orderly implementation of the redemption, in particular, the correct computation of the additional payment pursuant to para 3 and the settlement amount pursuant to para 4 as well as the fulfillment of para 7.

## Chapter XXIV
## Transitional and Final Provisions

### Transitional Provisions

**§ 103.** After this federal statute enters into force, the following transitional provisions shall apply:

1. (regarding § 2 No 5)
   Prior to the coming into effect of the EEA Agreement, only Austria shall be considered a Member State.
2. (regarding § 2 No 8)
   Prior to the entry into force of the EEA Agreement, all states outside Austria are considered third countries.
3. (regarding § 2 No 13)
   Prior to the entry into force of the EEA Agreement, whoever outside Austria is authorized to conduct businesses within the meaning of § 1 para 1 pursuant to the provisions of his state of incorporation shall be considered a foreign credit institution.
4. (regarding § 2 No 14)
   Prior to the entry into force of the EEA Agreement, whoever outside Austria is authorized to conduct businesses within the meaning of § 1 para 2 pursuant to the provisions of his state of incorporation shall be considered a foreign financial institution.
5. (regarding § 4 para 1)
   To the extent that, at the date of entry into force of this federal statute, a credit institution is permitted to conduct banking business under the previously applicable legal provisions, it does not require a license pursuant to § 4 para 1.
6. (regarding § 5 para 1 No 9)
   Managers appointed prior to the date of entry into force of this federal statute that are not Austrian nationals do not require a certificate of the home Member State.
7. (regarding § 9)
   It is presumed that branch offices of Member State credit institutions that are authorized to conduct banking business at the time of entry into force of this federal statute have been subject to the proceeding pursuant to § 9 paras 1 through 4. Paras 5 and 7 of § 9 and § 15 shall apply.
8. (regarding §§ 11 and 13)
   It is presumed that branch offices of Member State financial institutions that are authorized to perform in Austria activities within the meaning of

Nos 2 through 14 of the Annex to Directive 89/646/EEC have been subject to the proceeding pursuant to § 11 paras 1 through 3 or § 13 paras 1 through 3. § 11 para 5, § 13 para 4 and § 17 shall apply.

9. (regarding § 22 para 1)

a) If the own funds of the credit institution or the group of credit institutions do not reach 8% of the assessment basis on January 1, 1994, they shall be increased to this value prior to January 1, 1995.*) Until this goal has been reached, the following provisions shall apply:
   aa) the credit institution may not, in the course of the year, let the solvency ratio drop below the attained level;
   bb) the superordinate credit institution may not, in the course of the year, let the solvency ratio of the group of credit institutions drop below the attained level;
   cc) the credit institution and the institutions of the group of credit institutions may not avail themselves of the freedom to provide services and the freedom of establishment pursuant to §§ 10, 12 and 14.

b) Credit institutions already in existence on January 1, 1994 whose own funds on that date have not reached the sum of 70 million Schillings prescribed for initial capital may not drop below the amounts of own funds reached on December 31, 1997 and on the subsequent balance sheet dates as long as they have not attained 5 million euro of initial capital. If control of such a credit institution is taken over by a physical person or legal person different from the one previously exercising control of the credit institution, the initial capital must from this point in time onwards amount to 5 million euro.

c) In case of a merger whereby a new company is formed pursuant to the Act on Mergers of Cooperative Societies or in case of a union of two or more credit institutions that can lay claim to lit b first sentence, the own funds of the credit institution emanating from the union shall attain at any given time the consolidated amount of own funds of the merging credit institutions present at the date of the merger; lit b last sentence shall also apply to this credit institution.

d) If the own funds of a housing construction savings and loan association do not attain 8% of the assessment basis on January 1, 1994, they shall, based on the percentage existing on that date and starting from December 31, 1994, be increased in equal annual percentile steps so as to reach 8% of the assessment basis on January 1, 1999. Lit a sublit aa through cc shall apply by analogy.

9a. (regarding § 22 para 1)

The following shall apply to credit institutions appointed by the Vienna Exchange Commission pursuant to § 57 Stock Exchange Act as free brokers for the duration of their appointment as brokers:

If the own funds of these credit institutions do not reach the amount fixed for initial capital, the maximum amount of own funds reached after Janu-

*) As corrected by BGBl No 639/1993.

ary 1, 1997 may not be undercut until the amount required for initial capital has been reached. The provisions of No 9 lit b and c on the change of control over the credit institution and on the merger of credit institutions shall apply.

10. (regarding § 22 para 3)
    a) Money claims that are refinanced through mortgage bonds and municipal bonds pursuant to the provisions of the Mortgage Bonds Act 1927, dRGBl I p. 492 and the Mortgage Banks Act as published in dRGBl I p. 1574/1938 and whose purpose is to cover securities may be weighted with 50% until January 1, 2001.
    b) Mortgage bonds, municipal bonds and funded bank bonds issued prior to January 1, 1998 pursuant to the provisions of the Mortgage Bonds Act 1927, dRGBl I p. 492, the Mortgage Banks Act as published in dRGBl I p. 1574/1938 and the Statute of December 27, 1905 (RGBl No 213) on Funded Bank Bonds shall be weighted with 10%.
    c) Assets items arising from real estate leasing transactions entered into before January 1, 2001 shall be weighted with 50% if the leasing object is located in Austria, is used commercially and if the lessor remains unrestricted owner of the leasing object until the lessee exercises his buying option.
    d) Credit institutions within the meaning of § 3 para 1 No 4 may weight claims on legally recognized religious communities and on their affiliated institutions with 0% if the claims are refinanced by bonds issued before January 1, 1993.
    e) Credit institutions within the meaning of § 3 para 2 No 6 may weight claims against credit institutions belonging to the same sector with 0% if they are refinanced by bonds issued before January 1, 1993.
    f) Loans that are fully secured by mortgages on offices or business premises permitting a variety of uses that are located in the territory of a Member State which allows a weighting with 50%, may be weighted with 50% according to the following provisions. The part of the loan that does not exceed the upper limit pursuant to sub lit aa or bb shall be weighted with a risk of 50%. The part of the loan exceeding these upper limits shall be weighted with 100%. The real estate must be either used by the owner or rented out.
        aa) Upper limit 50% of the market value of the real estate concerned:
        The market value of the real estate must be determined by two independent valuers that make independent valuations at the time the loan is extended. The loan shall be based on the lower of the two valuations. The real estate shall be valued anew by a valuer at least once a year. In the case of loans that do not exceed one million euro and 5% of the own funds of a credit institution, the real estate shall be valued anew by a valuer at least once every three years.
        bb) Upper limit 50% of the market value of the real estate or 60% of the securable value – depending on which value is lower – in the

Member States, whose legal and administrative provisions contain restrictive criteria for valuing the securable value:
Securable value shall be the value of the real estate as determined by a valuer, who performs a careful valuation of the future marketability of the real estate taking into account its long term characteristics that are not subject to change, the normal and local market conditions, its present use as well as adequate alternative uses. Speculative aspects may not influence the valuation of the securable value. The securable value shall be demonstrated in a transparent and clear manner. The securable value and in particular the facts on which it is based with respect to the development of the market concerned shall be revalued at least every three years or whenever the market value decreases by more than 10%.
In the instances of sublit aa) and bb) the market value shall be the price at which the real estate could be sold by a willing seller to an independent buyer by way of private contract at the time of valuation, assuming that the real estate is publicly offered on the market, that market conditions allow an orderly sale and that taking into account the type of real estate adequate time is available to negotiate a sale. Loans outstanding on January 1, 1999 may be weighted with 50% if the conditions set forth in this paragraph are fulfilled. In this case the real estate shall be valued according to the aforementioned valuation criteria no later than three years following the implementation of the Directive.

11. (regarding § 22 para 4)
In case of joint sureties for issuings of credit institutions offered before January 1, 1993, the share of the institution shall be deemed an off-balance sheet transaction with high credit risk, and other joint sureties shall be deemed a low credit risk.

11 a. (regarding § 22 b para 4)
Credit institutions that exceed one of the thresholds pursuant to § 22 b para 2 Nos 3 or 4 on December 31, 1997, shall, beginning with January 1, 1998, calculate the own funds requirement of the trading book pursuant to § 22 b para 1 and report this fact without delay to the Federal Minister of Finance and to the Oesterreichische Nationalbank.

11 b. *(Repealed by federal statute BGBl I No 33/2000)*

11 c. (regarding § 22 g)
Regarding the specific position risk, the following weightings shall, depending on their maturity, apply to mortgage bonds, municipal bonds and funded bank bonds issued prior to January 1, 1998 pursuant to the provisions of the Mortgage Bonds Act 1927, dRGBl I p. 492, the Mortgage Banks Act as published in dRGBl, I, p. 1574/1938 and the Statute of December 27, 1905 (RGBl No 213) on Funded Bank Bonds:

| up to 6 months | over 6 and up to 24 months | over 24 months |
|---|---|---|
| 0,125% | 0,5% | 0,8% |

11 d. (regarding § 22 p paras 8 and 12)
Until December 31, 2006, credit institutions may use the minimum spread, carry and outright rates set out in the following table instead of those indicated in § 22 p paras 8 and 12 provided that they
a) undertake significant commodities business,
b) hold a diversified commodities portfolio and
c) are not yet in a position to use internal models for the purpose of calculating the capital requirement on commodities risk in accordance with § 26 b.

| | Precious metals (except gold) | Base metals | Agricultural products (softs) | Other products, including energy products |
|---|---|---|---|---|
| Spread rate (%) | 1.0 | 1.2 | 1.5 | 1.5 |
| Carry rate (%) | 0.3 | 0.5 | 0.6 | 0.6 |
| Outright rate (%) | 8 | 10 | 12 | 15 |

12. (regarding § 23 para 6)
The liability reserve formed in the annual financial statements prior to December 31, 2000 pursuant to § 23 para 6 as amended by federal statute BGBl I No 123/1999 shall be carried over as such in the books; the provisions on dedicated use as set forth in § 23 para 6 as amended by federal statute BGBl I No 123/1999 shall continue to apply. The percentage rate set forth in § 23 para 6 as amended by federal statute BGBl I No 33/2000 shall apply to the increase of the assessment basis that has occurred since January 1, 2001.
13. (regarding § 23 para 8 No 4)
§ 23 para 8 No 4 shall apply to subordinated capital issued after December 31, 1993.
14. (regarding § 23 para 13 No 1)
A goodwill shown as asset item in the last annual financial statement prior to January 1, 1994 shall be deducted incrementally in ten equal annual steps, starting with the first balance sheet date following January 1, 1994.
15. (regarding § 23 para 13 No 6)
Alternatively to the provision of § 23 para 13 No 6 credit institutions affiliated with a central institution may deduct their participations held directly or indirectly in the central institution pursuant to § 23 para 13 Nos 3 or 4 according to the following phase plan:
a) January 1994 until December 31, 1994: . . . . . 15%
b) January 1995 until December 31, 1995: . . . . . 30%
c) January 1996 until December 31, 1996: . . . . . 45%
d) January 1997 until December 31, 1997: . . . . . 60%
e) January 1998 until December 31, 1998: . . . . . 80%
from January 1, 1999: . . . . . 100%

16. (regarding § 24 para 2 No 2)

The differential amount shown on the Assets side arising from the combined sum of equity capital and participations within the meaning of § 254 Commercial Code shall, as to credit and financial institutions that, pursuant to § 12a para 1 of the Credit System Act as amended by federal statute BGBl No 325/1986 were not members of the banking group, be treated like a participation in an institution unrelated to the group for a maximum period of ten years, starting with the first balance sheet date following January 1, 1994, with an amount decreasing annually by one tenth; § 23 para 13 shall not apply.

17. (regarding § 25)

Until December 31, 1996 original maturities shall apply.

18. (regarding § 26 para 1)

When applying the foreign exchange rates pursuant to § 26 para 1 No 2, starting with the date at which the Schilling shall be replaced by the euro, for a period of three respectively five years account shall be taken of the fluctuation vis-à-vis the respective Austrian currency. For purposes of converting Schilling into euro the exchange rate irrevocably set by the Council of the European Union pursuant to Article 109*l* para 4 first sentence of the EC Treaty shall apply.

18a. (regarding § 26 para 1)

Until December 31, 2004 credit institutions (groups of credit institutions) may calculate their own funds requirement by multiplying by 8% the amount by which the total currency position exceeds 2% of their own funds to be taken into account (free amount).

19. (regarding § 26 para 5 and § 26a)

For credit institutions within the meaning of No 21 lit a, the assessment basis shall until December 31, 1998 be increased by the endowment deposits if the latter are to be taken into account pursuant to No 21 lit a.

20. (regarding § 26a para 6)

The authorization is not required if a credit institution already has an equivalent authorization pursuant to § 14a para 7 of the Credit System Act 1979 as amended by federal statute BGBl No 325/1986 or pursuant to § 26 para 7 of this federal statute, as amended by BGBl No 532/1993.

20a. (regarding § 26b)

Credit institutions that request the Federal Minister of Finance's special authorization to calculate the own funds requirement according to a model chosen by the credit institution may, with the approval of the Federal Minister of Finance, apply this model even without special authorization pursuant to § 26b para 3 until 31. 12. 1999 at the latest; approval has to be granted if all of the following conditions are met:

a) the model is being applied by the credit institution at the time the request is filed;
b) the credit institution shows that the model meets the requirements set forth in § 26b para 3 Nos 1 through 3;

c) the credit institution has an opinion issued by an independent expert opining on the fulfillment of the market requirements, their description in the structure of the model and the requirements listed in § 26 b para 5 No 2;
d) a short expert opinion of the Oesterreichische Nationalbank has reached a positive conclusion; the Oesterreichische Nationalbank has to audit the requirements set forth in § 26 b para 3 Nos 1 through 3 as well as in § 26 b para 5 No 1 on a random basis and, based on the audit's results, has to issue an opinion on the probable suitability of the model; the Oesterreichische Nationalbank shall also examine whether there are any doubts as to the independence of the expert appointed by the credit institution.

The Federal Minister of Finance's approval shall lapse if a final ruling has been issued on the request for granting the authorization pursuant to § 26 b para 3.

21. (regarding § 27)
a) *(Repealed by federal statute, BGBl I No 45/2002.)*
b) Until December 31, 1998 those Assets items, off-balance sheet transactions and special off-balance sheet financial transactions whose value calculated according to § 27 para 2 as amended by federal statute BGBl No 445/1996 reaches 15% of the credit institution's or group of credit institution's own funds to be taken into account and amounts to at least 7 million Schillings shall be considered to be large exposures.
c) Until December 31, 1998, the thresholds of 40% and 30% shall apply instead of the thresholds of 25% and 20% referred to in § 27 para 7 as amended by federal statute BGBl No 445/1996 as maximum amounts of single large exposures.
d) Large exposures contractually incurred as of January 1, 1995 in an amount exceeding 40% may in fulfillment of the contractual obligations of the credit institution remain operative until the agreed upon maturity provided the following conditions listed in sublit aa) through dd) are met:
aa) starting with January 1, 1997 their amount may not be increased;
bb) the exposure's amount as of January 1, 1997 must already have been agreed upon by January 1, 1995;
cc) the maturity of the exposure must already have been agreed upon by January 1, 1995;
dd) if no maturity has been agreed upon and if the exposure has been incurred for an unlimited period of time, notice must be given for no later than December 31, 1998.

Large exposures that exceeded the threshold of 30% on January 1, 1995 and which still exceed the threshold on December 31, 1998 may contractually continue to run under the prerequisites referred to in sublit aa through dd.

e) Large exposures that exceed the thresholds of 25% or 20% as per December 31, 1998 shall, irrespective of lit d be reduced to these percentage rates by December 31, 2001. Between January 1, 1999 and December 31, 2001 the amount may, however, not be increased.

f) The following shall apply to credit institution whose own funds to be taken into account do not exceed 95 million Schillings as per December 31, 1998: the terms pursuant to lit c and e shall be extended until December 31, 2003 and December 31, 2006, respectively.

g) Large exposures incurred prior to January 1, 2002 that are refinanced by mortgage bonds and municipal bonds pursuant to the provisions of the Mortgage Bond Act and the Mortgage Bank Act and serve the purpose of securities coverage may be weighted with 50%.

22. (regarding § 29 paras 1 and 2)

Participations existing at the date this federal statute enters into force that exceed the required limits may no longer be increased, unless the increase is covered by own funds pursuant to § 29 para 4; they shall be adjusted to the limits set forth in § 29 paras 1 and 2 by December 31, 2002 at the latest.

22 a. (regarding § 30 para 1)

Until December 31, 1999 only credit institutions shall qualify as superordinate institutions.

22 b. (regarding § 33 para 6)

Reference to the effective or fictitious annual interest rate and to the amount of change may be omitted from the written information to the consumer if the credit agreement was concluded prior to January 1, 1994 and will expire no later than December 31, 2003. If the written information to the consumer contains no reference to the effective or fictitious annual interest rate, the credit institution shall

aa) point to the fact that interest rates otherwise shown do not allow for an accurate comparison with cost indications on the basis of the effective or fictitious annual interest rate and

bb) communicate to the consumer in writing upon the latter's explicit request the effective or fictitious annual interest rate as well as the amount of change in the interest rate.

23. (regarding § 33 para 8)

§ 33 para 8 shall not apply to loans extended prior to January 1, 1994.

24. (regarding § 40 para 2)

Customers holding active accounts for someone else's account shall inform the credit institution or financial institution of this fact and of the trustor's identity by December 31, 1994. The credit institutions and financial institutions shall, after this term has expired, proceed pursuant to § 41 para 1 first sentence in case of reasonable suspicion that the legal duty to disclose the accounts has been violated.

25. (regarding § 42 para 7)

§ 42 para 7 shall enter into force on January 1, 1995.

25a. (regarding § 43 para 3)
The provision shall cease to apply to business years beginning after December 31, 2001.

25b. (regarding § 44 paras 3 through 6)
Paras 3 through 6 shall for the first time apply to business years beginning after December 31, 1995.

26. *(Repealed by federal statute, BGBl No 753/1996.)*

27. (regarding § 43, Annex 2)
Annex 2 to § 43 shall for the first time be applicable to business years ending after December 31, 1994.

28. (regarding §§ 45 through 56, 58 and 59)
§§ 45 through 56, 58 and 59 shall enter into force on January 1, 1995.

28a. (regarding § 59 para 1)
Until December 31, 1999 the superordinate credit institution shall also draw up a consolidated financial statement and a consolidated annual report for parent companies whose sole purpose is to acquire participations in subsidiaries as well as administer and exploit these participations, to the extent these subsidiaries are exclusively or predominantly credit institutions.

28b. (regarding § 62 No 1)
Auditors, authorized to audit banks under previously applicable provisions and who effectively carried out this auditing are considered as admitted auditors within the meaning of § 13 Cooperation Societies Auditing Act 1997. A bank auditor admitted in this manner must until September 30, 1999 notify and provide proof of previous activity to the Federal Ministry of Justice who will enter the name into the list of admitted auditors (§ 13 para 2 Cooperation Societies Auditing Act 1997). Auditors admitted for bank auditing are entered in the list of admitted auditors that have the right to perform bank auditing according to § 61 of the Banking Act.

29. (regarding § 63 para 1)
§ 63 para 1 shall for the first time apply to business years starting after December 31, 1994.

30. (regarding § 64 para 1 No 4)
§ 64 para 1 No 4 shall for the first time apply to business years starting after December 31, 1995. The following shall apply to business years ending before December 31, 1996:
the structure of the claims and liabilities referred to in § 64 para 1 No 4 shall be effected on the basis of the maturity or period of notice originally agreed upon.

30a. (regarding § 64 paras 4 and 5)
§ 64 paras 4 and 5 shall for the first time apply to business years starting after December 31, 1995.

30b. (regarding § 64 para 6)
§ 64 para 6 shall be applied for the first time to business years that begin after December 31, 1998.

30 c. (regarding § 75 para 3)
Until December 31, 1996, the scope of the request shall be determined according to § 75 para 3 as amended by federal statute BGBl No 383/1995.

30 d. (regarding § 77 paras 4 and 5)
The providing of information and the transmission of information pursuant to § 77 paras 4 and 5 as amended by federal statute BGBl No 445/1996 shall be permitted starting August 1, 1996.

31. (regarding § 74 para 4 No 3)
Until December 31, 1996 the calculation of whether the provisions on liquidity are complied with shall (also) be effected on the basis of original maturities.

31 a. (regarding §§ 93 to 93 b)
The notification of claims resulting from investment services that require cover according to § 93 para 3 c as amended by federal statute BGBl I No 63/1999 may be effected as of the publication of federal statute BGBl I No 63/1999 for all guaranteed events that occurred after September 26, 1998. The period mentioned in § 93 para 3 c runs for claims registered before May 1, 1999 as of this date.

32. (regarding § 93 para 8)
Member State credit institutions (§ 9 para 1) that accept deposits requiring guarantee in Austria and are not members of a comparable deposit guarantee facility shall expressly refer to this fact in their advertising and in the contractual document and, if applicable, display this fact in the cashier's hall of the branch office.

32 a. (regarding § 93 paras 8 and 8 a)
For business relationships in existence on the date of the enactment of the federal statute BGBl I No 63/1999, depositors and investors need to be provided in the next end of year account statement with a notice regarding the opportunity of the transmission or handing out of the information regarding the guarantee scheme. In case the next communication with the depositor or investor occurs through their independent inquiry regarding account information, the information regarding the opportunity of the transmission or handing out of the information of the guarantee scheme shall be provided as technically feasible.

33. (regarding § 94 para 3)
Companies existing at the time this federal statute enters into force that use in their company name the designation *"Finanz-Holding"* (financial holding company) or a designation in which this word is contained shall amend their company name prior to January 1, 1998.

**§ 103 a.** If rounding differences remain following the crediting of a transfer within the meaning of Article 8 para 3 of Council Regulation No 974/98, the claim underlying the transfer is deemed to be settled. The receiver of the transfer is obligated to accept the payment in this case. The party ordering the transfer does not have any claim for a restitution of a possible amount exceeding the underlying claim.

**§ 103b.** (Regarding § 31 paras 1 and 3 and § 32 para 4):

The provisions of §§ 31 paras 1 and 3 and 32 para 4 as amended by federal statute BGBl I No 33/2000 shall apply to new savings deposit contracts effective November 1, 2000. After June 30, 2002, payments to and withdrawals from savings documents existing as of that date that do not carry the name of the customer, in particular bearer savings documents, may, irrespective of § 40 para 1 No 4 as amended by federal statute BGBl I No 33/2000, only be effected if the conditions stated in § 31 para 1 as amended by federal statute BGBl I No 33/2000 are met.

**§ 103c.** Upon entry into force of federal statute BGBl I No 97/2001 the following transitional provisions shall apply:

1. The punishability of administrative offences pursuant to §§ 98 and 99 as in effect until March 31, 2002 shall not be affected by the entry into force of federal statute BGBl No 97/2001; such offences remain punishable according to §§ 98 and 99 as in effect until March 31, 2002.
2. Administrative penalty proceedings initiated for administrative offences referred to in No 1 and pending on March 31, 2002 shall be continued by the authorities competent as of March 31, 2002.
3. Administrative penalty proceedings initiated on or after April 1, 2002 for administrative offences referred to in No 1 shall be conducted by the FMA.
4. Enforcement proceedings of rulings issued on the basis of the federal statutes listed in § 69 and pending on March 31, 2002 shall be continued by the authorities competent as of March 31, 2002.
5. The administrative proceedings based on the federal statutes listed in § 69 and pending on March 31, 2002 with the Federal Ministry of Finance shall as of April 1, 2000 be continued by the FMA.
6. Audits of the Oesterreichische Nationalbank pursuant to § 79 para 4 as amended by federal statute BGBl I No 2/2001 pending on March 31, 2002 shall be continued by the Oesterreichische Nationalbank pursuant to this provision; they shall be completed no later than June 30, 2002. The Oesterreichische Nationalbank shall also after June 30, 2002 be authorized and obligated to communicate to the FMA the audit results and to provide to the latter all necessary information. The FMA may, should it require further information, solicit information directly from the employees of the Oesterreichische Nationalbank charged with performing the audit and the reporting; in such cases an express release from their professional secrecy obligation is not required. The Oesterreichische Nationalbank may furthermore provide the bank auditor of the credit institution concerned with the necessary information on the results of audits it has performed.
7. Rulings and regulations issued by the Federal Minister of Finance until March 31, 2002 on the basis of the federal statutes listed in § 69 shall remain unaffected by the transfer of the banking supervision competence to the FMA effected by federal statute BGBl I No 97/2001.

8. Costs incurred until but not yet charged as of March 31, 2002 for the measures listed in § 70 para 7 as amended by federal statute BGBl I No 2/2001 shall be charged by the FMA to the legal entities concerned and upon receipt credited to the Federation.
9. The Bundesrechenzentrum GmbH shall, upon request of the FMA, perform the services in support of the Federal Minister of Finance listed in § 72 para 2 also to the FMA, if and as long as this should be necessary to fulfill the banking supervisory functions of the FMA; the Bundesrechenzentrum GmbH is authorized to charge an adequate fee for the performance of these services.
10. The report pursuant to § 73 para 6 and the Annex thereto shall for the first time be issued for the balance sheet date of the last business year ending prior to January 1, 2001; the term referred to in § 73 para 6 shall not apply.
11. The reports pursuant to § 74 paras 7 and 8 shall for the first time be issued in the first quarter of 2002.
12. The provisions of § 75 para 1 No 4 shall for the first time apply to business years ending after December 31, 2002.
13. The disqualification ground listed in § 62 No 6 a shall, for bank auditors, heads of audit and persons having signed the audit certificate, for the first time apply to the business year beginning after December 31, 2003.
14. To the extent the provisions mentioned in § 107 para 25 refer to the FMA, the Federal Minister of Finance shall replace the FMA until March 31, 2002.

**§ 103 d.** (1) § 24 para 2 No 1 as amended by federal statute BGBl I No 97/2001 shall apply to hybrid capital issued prior to May 1, 2001 whose conditions have complied with the international standard applicable at the time and whose issuance and conditions had been communicated to the Federal Minister of Finance until that date; under these conditions, it may be taken into account pursuant to § 24 para 2 No 1 also following the entry into force of federal statute BGBl I No 97/2001, if the conditions listed in § 24 para 2 Nos 5 and 6 as amended by federal statute BGBl I No 97/2001 are not fully met.

(2) An inclusion of assets items pursuant to § 24 para 2 No 1 in the liquid resources of the second degree of a credit institution may take place between August 31 and December 31, 2001 to the extent the credit institution has, during that term, deposited collateral with the Oesterreichische Nationalbank to secure its euro bank notes position.

### Change of Designations

**§ 104.** The words *„Bank“* (bank) and *„öffentlich-rechtliche Kreditanstalt“* (credit establishment of public law) shall in all federal statutory regulations be replaced by the terms *„Kreditinstitut“* (credit institution) and *„öffentlich-rechtliches Kreditinstitut“* (credit institution of public law).

### References and Regulations

**§ 105.** (1) Insofar as this federal statute refers to other federal statutes, these statutes shall be applicable as amended, unless otherwise provided.

(2) To the extent that other federal statutes refer to provisions of the Credit System Act, the corresponding provisions of this new Banking Act take their place.

(3) Regulations pursuant to this federal statute may already be issued the day following its publication.

### Repeals

**§ 106.** (1) Upon entry into force of this federal statute, the following legal provisions shall be repealed:

1. the Credit System Act, last amended by federal statute BGBl No 407/1993, with the exception of § 35 a;
2. **(provision in the rank of constitutional law)** § 35 a of the Credit System Act, last amended by federal statute BGBl No 407/1993;
3. Articles II and III of federal statute BGBl No 325/1986;
4. the Bank Agents Act, BGBl No 251/1932;
5. the Central Monetary Institutions Act, last amended by federal statute BGBl No 10/1991;
6. the Receivership Act, BGBl No 204/1934;
7. the Reconstruction Act, last amended by federal statute BGBl No 325/1986;
8. the Federal Statute on the Sale of Shares of Nationalized Banks, last amended by federal statute BGBl No 323/1987, except § 3;
9. **(provision in the rank of constitutional law)** § 3 of the Federal Statute on the Sale of Stock of Nationalized Banks, last amended by federal statute BGBl No 323/1987;
10. Art XVII and Art XVIII § 1 para 1, § 6 and § 9 para 2 No 6 of the Federal Statute on the Reorganization of Pupils' Law, BGBl No 403/1977;
11. the Regulation on Contingent Liabilities, BGBl No 676/1986;
12. the Regulation on Liquidity, BGBl No 677/1986;
13. the Second Regulation on Liquidity, BGBl No 450/1988;
14. the Regulation on Major Investments, BGBl No 676/1986;
15. the Regulation on Quarterly Reports, BGBl No 451/1988;
16. the Regulation on Reporting Major Investments, last amended by regulation BGBl No 652/1990;
17. the Regulation on Monthly Reports, last amended by regulation BGBl No 707/1988;
18. the Regulation on Reporting Reserves, BGBl No 449/1989;
19. the Regulation on the Bank Supervision Audit Report, last amended by regulation No 450/1989;
20. the Regulation on the Contributions to Reconstruction, BGBl No 254/1955;
21. the Regulation on the Cumulative Value Adjustment, BGBl No 565/1986; and

22. the Regulation on the Protection of Moneys Held in Trust for Wards, BGBl No 685/1977.

(2) Annex 1 to § 43 as amended by federal statute BGBl No 532/1993 Art I shall be repealed on December 31, 1996.

### Entry into Force and Implementation

**§ 107.** (1) Unless otherwise provided hereinafter, this federal statute shall enter into force on January 1, 1994.

(2) § 1 para 4, § 2 Nos 6, 7 and 9, § 8 paras 1 through 4, 6 and 7, §§ 9 through 19, § 20 para 8, § 22 para 3 No 1 lit b last half sentence, No 2 lit g last half sentence, No 6 second and third half sentence, No 7 last half sentence, paras 9 and 10, § 23 para 9 No 3 lit a and b, § 77 para 4, § 93 para 7, § 94 para 10, § 98 para 2 Nos 1 and 2, § 99 Nos 1 and 2 and § 103 Nos 7, 8 and 9 lit a sublit cc shall enter into force with the entry into force of the EEA Agreement, but no earlier than January 1, 1994.

(3) **(Provision in the rank of constitutional law)** § 38 para 5 shall enter into force on January 1, 1994.

(3a) § 97 para 1 No 1 as amended by federal statute BGBl No 445/1996 shall enter into force on December 1, 1994.

(4) § 76 para 2 No 1 as amended by federal statute BGBl No 22/1995 shall enter into force on December 31, 1994.

(5) § 2 No 5, § 8, § 10 para 8, § 12 para 7, § 14 para 7, § 15 paras 2 and 3, § 17 para 2, § 22 para 3 No 1 lit b, No 2 lit g, Nos 6 and 7, para 9 No 2 and para 10 as amended by federal statute BGBl No 22/1995 shall enter into force upon accession to the European Union.

(5a) The Table of Contents as regards the provisions mentioned hereinafter, § 1 para 1 No 4, § 2 Nos 2, 3, 12 23 lit a and d as well as lit I through m, 24, § 3 para 1 Nos 4 through 7, § 3 para 3 No 1, § 4 para 6, § 5 para 1 No 9 and para 2, § 6 para 1, § 9 paras 7 and 8, § 11 para 1 No 5 and para 5 and paras 5 and 6, the repeal of § 12, § 13 para 2 No 5 and paras 4 and 5, the repeal of para 4, § 15 paras 1 and 5, § 17 paras 1 and 4, the repeal of § 18, § 20 paras 5 and 7a, § 21 para 1 No 2, § 22 para 3 No 2 lit I and k, § 23 para 1 No 2, para 4 No 5, the repeal of para 4 No 6, para 7 No 1 and para 5, the repeal of para 7 No 6, para 8 No 1, para 13 No 3 and the repeal of para 17, § 25 para 6 Nos 6 and 7, § 29 para 4, § 33 para 7 Nom 1, § 35 para 1 Nos 2 and 3, § 38 para 2 No 2 and para 4, § 39, § 43 para 1, § 44 paras 3 through 6, § 61, § 63 paras 6 and 7, § 64 para 1 Nos 13 and 14, § 64 paras 4 and 5, § 65 paras 2a and 3a, § 70 paras 1, 5 and 7, § 71 paras 1 and 7, § 75 paras 3 and 5, § 77 paras 4 through 8, § 77a, § 79 para 2, § 82 para 1, § 86 para 1, § 86 para 6, § 93, § 93a, § 98 para 2 Nos 8 and 10, § 99 Nos 13, 14 and 17, § 99b, § 103 Nos 10 lit a, 22b, 25a, 30, 30a, 30b, 30c and 32, and Annex 1 to § 22 No 1 lit c and No 2 lit a and b as amended by federal statute BGBl No 445/1996 shall enter into force on August 23, 1996.

(5b) The Table of Contents, § 2 Nos 25 through 27, § 24 para 1 and para 3 No 2, § 28, § 30, § 33 para 2 Nos 5 and 6 and para 9, § 37, § 59, § 70a, § 73 para 3, § 94 para 3, § 98 para 2 Nos 5 and 7, § 99 Nos 6 and 15, § 99a,

§ 103 Nos 19, 22 a, 28 a and 33 as amended by federal statute BGBl No 445/1996 shall enter into force on January 1, 1997.

(5 c) § 2 No 23 lit g, § 27, § 74 para 4 No 1, § 75 para 1, § 97 para 1 No 6 and § 103 No 21 as amended by federal statute BGBl No 445/1996 shall enter into force on July 1, 1997.

(6) § 40 para 1 Nos 1 and 3, paras 2 and 5 as amended by federal statute BGBl No 446/1996 shall enter into force on August 1, 1996. In case of existing contractual asset management and/or reinvestment obligations of the credit or financial institution, however, § 40 para 5 shall apply only starting November 1, 1996.

(6 a) § 3 para 1 No 2 shall be repealed upon registration of the transfer of the business of the Österreichische Postsparkasse pursuant to Art I § 1 of federal statute BGBl No 742/1996 into the register of companies. This date shall be published by the Federal Minister of Finance in the Federal Law Gazette (BGBl)*).

(7) The Table of Contents as regards the provisions mentioned hereinafter, § 1 para 1 Nos 7, 11, 13, 14 and 19, the repeal of § 1 para 2 No 4, § 1 para 3 first sentence, § 2 Nos 6, 7, 9, 16, 18, 23 lit a, 25, 26 and 28 through 52, § 3 para 5, § 4 para 5, § 5 para 1 Nos 4, 4 a and No 14, § 5 para 2, § 8 paras 2 through 5, § 9 a, § 20 para 8, § 22 para 3 No 1 lit d, No 2 lit h and j, § 38 para 2 No 9, § 44 para 1, § 63 paras 3 a and 3 b as well as para 4 No 2 a, § 93 para 5 No 12, § 94 para 3, § 99 No 15, § 103 No 9 a, 11 b and 20 a, § 105 para 1, § 106, § 108 and Annex 2 to § 43, part 2, Nos 15 and 16 as amended by federal statute BGBl No 753/1996 shall enter into force on January 1, 1997.

(8) The Table of Contents as regards the provisions mentioned hereinafter, § 27 para 3 Nos 2 and 8, § 75 para 1 Nos 1 and 2, § 77 para 5 and para 6 Nos 4 through 7, the repeal of § 103 No 26 as amended by federal statute BGBl No 753/1996 shall enter into force on July 1, 1997.

(9) The Table of Contents as regards the provisions mentioned hereinafter, § 22 para 1 and para 2 first sentence, para 5, paras 6 through 6 f and para 10 No 1, §§ 22 a through 22 o including headings, § 23 para 1 No 9, para 6 second sentence, para 8 a, para 14 Nos 4, 7 and 8, paras 15 and 16, § 24 para 1, § 25 para 1, §§ 26 through 26 b including headings, § 27 paras 1, 2, 2 a, 2 b, § 29 para 4, § 30 paras 1 and 9, § 39 para 4, § 42 para 4, § 63 para 4 Nos 5 and 6, § 64 para 1 No 15, § 73 para 1 No 12 as well as paras 4 and 5, § 97 para 1 Nos 4 through 6, the repeal of § 97 para 1 No 7, § 98 para 2 No 7, § 103 Nos11 a, 11 c, Nos 18, 19 and 20, Annex 1 to § 22 No 1 lit h through j, No 2 lit e and No 4 lit a, the heading in Annex 2 to § 22 No 2, Annex 2 to § 22 No 2 lit e and Nos 3 through 6, Annex 2 to § 43, part 1, Liabilities, Nos 4 and 5 of the off-balance sheet items as amended by federal statute BGBl No 753/1996 shall enter into force on January 1, 1998.

(10) § 3 para 3 No 6, § 221 para 1 No 2, § 40 para 1 No 3, § 41 paras 3, 3 a and 4, § 44 para 1 last sentence, para 3 and para 6, § 61 para 1, § 75 para 1 No 1 and para 5 and § 103 No 9 lit b as amended by federal statute BGBl I No II/1998 shall enter into force on January 1, 1998. § 97 para 1 No 1 and

*) The date – 14. 5. 1997 – was published in BGBl I No 58/1997.

Nos 4–6 as amended by federal statute BGBl I No II/1998 shall enter into force on January 1, 1994.

(11) § 1 para 5 and § 100 para 2, as amended by Federal Statute BGBl I No 126/1998 shall enter into force on August 1, 1998.

(12) § 40 para 1 No 3 and § 41 para 6 as amended by federal statute BGBl I No 153/1998 shall enter into force on October 1, 1998.

(13) § 1 para 1 No 18 lit c, § 1 para 2 No 2, § 2 No 10, § 2 No 23 lit a, § 3 para 1 No 8, § 3 para 4, § 4 para 4 No 3, § 5 para 1 No 5, § 9 para 3 No 2, § 9 para 7 and para 8, § 15 para 1, § 22 para 3 No 3 lit c, § 22 d para 3, § 23 para 1 No 9, § 23 para 3 No 2, § 23 para 11, § 24 para 3 Nos 2 through 4, § 25 para 4, § 25 para 5, § 25 para 6 Nos 4 a through 6, § 25 para 7 No 2, § 25 para 8, § 25 para 9, § 25 para 10, § 25 para 11 Nos 3 and 4, § 25 para 12, § 25 para 13, § 26 para 1, § 26 para 2, § 26 para 3, § 26 para 5, § 27 para 3, § 27 para 4 a, § 43 para 3, the repeal of § 44 para 4 No 3, § 44 para 4 No 4, § 51 para 10, § 59 para 5, § 62 No 3, § 63 para 6 No 2, § 63 para 6 a, § 63 para 7, § 70 para 1 No 4, § 70 para 4 No 2, § 70 a para 1, § 71 para 3 No 4, § 73 para 1 No 13, § 75 para 1 No 3, § 77 para 4 No 19, § 77 para 5, § 77 para 6 and para 7, § 77 a para 2, § 79 para 4, § 93 para 3, § 93 para 5 No 11, § 99 No 6 a, § 102 para 1 No 1 and para 6, § 103 No 10 lit a through lit c and lit f, § 103 No 18, § 103 Nos 25 a and 25 b and Annex 2 to § 43, Part 2 position 20 as amended by Federal Statute BGBl I No 126/1998 shall enter into force on January 1, 1999.

(14) The Table of Contents regarding § 103 a and 103 a as amended by federal statute BGBl I No 63/1999 shall enter into force on January 1, 1999.

(15) The Table of Contents regarding Chapter XIX, § 4 para 6, § 10 para 4 No 2, § 25 para 6 No 7, § 35 para 1 No 3, § 38 para 4, § 61 para 1, § 62 Nos 1, 14 and 15, § 64 para 6, § 73 para 1 No 10, § 75 para 3 No 6, § 77 para 4 No 17, § 92 para 7, Chapter XIX including the heading, § 98 para 2 No 10 and § 99 Nos 13 and 14, § 103 Nos 29 b, 30 b through 30 d and 32 a and Annex 2 to § 43, Part 1, Liabilities, Nos 4 and 5 of the items in the annual accounts as amended by federal statute BGBl I No 63/1999 shall enter into force on May 1, 1999.

(16) The Table of Contents regarding Chapter XXIII, § 3 para 3 No 6, § 23 para 4 No 2, § 30 para 7, § 82 para 1 and para 6 and § 102 a as amended by federal statute BGBl I No 123/1999 shall enter into force on July 1, 1999.

(17) § 21 para 1 No 6 and para 2, § 30 para 8 a, § 33 para 4, § 63 para 4 No 2, § 70 para 1 No 4, § 71 paras 1, 7 and 8, § 77 paras 3 and 5 through 7, §77 a and § 93 para 6 as amended by federal statute BGBl I No 33/2000 shall enter into force on April 21, 2000.

(18) The Table of Contents regarding Part V, § 2 No 26, No 34 lit a and b, the repeal of No 34 lit c, No 35 lit a, b and e, Nos 42 through 45, No 46 first sentence, No 46 lit b, No 47 and Nos 53 through 56, § 5 para 1 No 7, § 22 para 1 No 2, § 22 a, § 22 b paras 1 through 3, § 22 d paras 1, 3 and 4, § 22 e including the heading, § 22 f, § 22 g including the heading, § 22 h including the heading, § 22 i, § 22 l para 1 first sentence and para 1 No 1 first half-sentence, § 22 m para 1, § 22 n including the heading, § 22 p including the heading, § 23 para 6, § 24 para 1, § 26 including the heading, § 26 b paras 1 through 5, § 26 b

para 7 No 3, § 42 para 4 No 4 lit b through d, § 60, § 63 para 4 No 6 lit b through d, § 73 para 4 No 2 lit b and c, § 93a para 1, the repeal of § 97 para 1 No 4 and of § 103 No 11b, § 103 No 11d, No 12 and No 18a as well as Annex 2 to § 43, No 1 lit e as amended by federal statute BGBl I No 33/2000 shall enter into force on July 23, 2000.

(19) § 31 paras 1 and 3, § 32 paras 4 and 8, § 40 para 1 Nos 1 and 4, paras 2, 6 and 7 and § 103b as amended by federal statute BGBl I No 33/2000 shall enter into force on November 1, 2000.

(20) § 31 para 5, § 40 para 5, § 41 paras 1a and 6 and § 99 No 18 as amended by federal statute BGBl I No 33/2000 shall enter into force on July 1, 2002.

(21) § 25 para 10 No 9 lit a and § 103 No 9 lit b as amended by federal statute BGBl I No 2/2001 shall enter into force on January 1, 2001.

(22) § 3 para 2 No 5, § 22 para 3 No 1 lit a, § 25 para 10 No 4, § 27 paras 2 and 8, § 28 para 2 No 2, § 31 para 3, § 32 para 4 Nos 1 through 3, § 35 para 1 No 1 lit d, § 36 No 2, § 40 para 1 Nos 2 and 4, § 42 para 6, § 59 para 5, § 62 No 3, § 75 para 1 No 1, § 76 para 1, § 92 para 1, § 96, § 98 paras 1 through 4 and § 99 as amended by federal statute BGBl I No 2/2001 shall enter into force on January 1, 2002.

(23) § 41 para 1a No 3 as amended by federal statute BGBl I No 2/2001 shall enter into force on July 1, 2002.

(24) § 36 first sentence as amended by federal statute BGBl I No 135/2000, § 25 para 10 No 4, § 43 para 1 as amended by federal statute BGBl I No 97/2001 shall enter into force on July 1, 2001

(25) § 24 para 2 Nos 1, 5 and 6 as amended by federal statute BGBl I No 97/2001 shall enter into force on August 1, 2001.

(26) The Table of Contents regarding the provisions mentioned hereinafter, § 62 Nos 1a, 1b, 2, 4, 6a, 9, 10, 14 and 15, § 62a, § 63 paras 1 through 1c, paras 3, 6a, 7 and 8, § 103c Nos 13 and 14 as amended by federal statute BGBl I No 97/2001 shall enter into force on January 1, 2002.

(27) The Table of Contents regarding the provisions mentioned hereinafter, § 2 Z 57, § 4 paras 1, 3 and 5 through 7, § 5, § 6, § 7 paras 1 and 2, § 8 paras 1, 2, 3 und 5, § 9 paras 2, 3 and 5 through 8, § 9a paras 3 and 4, § 10 paras 2 through 8, § 11 paras 1, 3 and 4, § 13 paras 2 and 3, § 15, § 16, § 17, § 20 paras 1 through 3 and 5 through 8, § 21 paras 1 and 3, § 22 paras 3, 6b, 6c, 7, 9 and 10, § 22b para 4, § 22e paras 3 through 5, § 25 para 1 No 5, para 7 Nos 1 and 2, para 10 No 9, paras 12 and 14, § 26 para 3 Nos 1 and 5, § 26a paras 4 and 6, § 26b para 2 No 2 and paras 3 through 7, § 27 para 3 No 1, paras 10 and 11, § 30 paras 8 and 8a, § 41 paras 5 and 8, § 42 paras 3 and 4 No 1, § 43 para 2, § 44, § 59a para 2, § 60 para 3, § 61 para 2, § 63a, § 65 para 4, § 69, § 69a, § 70, § 70a, § 71 paras 1 and 2, § 73, § 74 paras 1 through 3 and 5 through 8, § 75 paras 1 and 3 through 6, § 76, § 77 paras 1, 2 and 4 through 6 and the repeal of para 8, § 77a paras 1, 2 and para 3 No 1, § 78 para 4, § 79, § 80, the repeal of § 81, § 82 paras 2, 3, 5 and 6, § 83 para 1, § 90 para 2 No 2 und para 5, § 91, § 92 para 10, § 93 paras 3, 9 und 10, § 93a para 8, § 93b para 5, § 93c, § 94 paras 1 and 2, § 97 para 1, § 98, § 99, § 99a paras 1 and 2 and § 103c Nos 1 through 12, Annex 2 to § 43 Part 1 No 7 off-balance

sheet Liabilities items as well as the Annex to § 73 para 6 as amended by federal statute BGBl I No 97/2001 shall enter into force on April 1, 2002.

(28) § 26 b paras 3 and 4, § 70 para 1 Nos 3 and 4 last half sentence, § 70 a para 2, § 77 a para 1 fist sentence and § 79 para 4 as amended by federal statute BGBl I No 97/2001 shall not enter into force.

(29) § 26 b paras 3 and 4, § 70 para 1 Nos 3 and 4 last half sentence, § 70 a para 2, § 77 a para 1 first sentence, § 78 paras 8 and 9 and § 79 para 4 as amended by federal statute BGBl I No 45/2002 shall enter into force on April 1, 2002.

(30) **(Provision in the rank of constitutional law)** § 79 para 5 as amended by federal statute BGBl I No 45/2002 shall enter into force on April 1, 2002.

(31) § 1 para 1 No 20, § 2 No 58, § 3 para 6, § 5 para 4, § 9 para 1, § 69 and § 70 para 4 as amended by federal statute BGBl I No 45/2002 shall enter into force on April 2, 2002 and § 103 No 21 lit a as amended by federal statute BGBl I No 45/2002 shall be repealed effective April 2, 2002.

**§ 108.** The following persons are charged with the implementation of this federal statute:

1. the Federal Government with respect to § 78 paras 1 through 3;
2. the Federal Minister of Justice with respect to § 41 para 7, § 82 paras 1 and 4, §§ 83 through 91 as well as § 100 and § 101;
3. the Federal Minister of Internal Affairs with respect to § 41 paras 1, 2, 3 and 6 second sentence;
4. the Federal Minister of Finance with the consent of the Federal Minister of Justice with respect to § 2 Nos 1 through 4, Nos 11 and 12, § 5 para 2, § 6 paras 4 and 5, § 7 para 2, § 20 para 6 No 3, § 21 paras 2 and 3, § 38 paras 1 and 2, § 43, § 44 para 1, § 63 para 2 last sentence and para 3, §§ 66 through 68, § 92 paras 4 and 9, § 94, § 102 as well as § 103 No 20;
5. the Federal Minister of Finance with the consent of the Federal Minister of Economic Affairs with respect to § 1 para 4;
6. the Federal Minister of Finance with respect to all other provisions.

# Annexes

**Annex 1**
to § 22

## Classification of Off-Balance Sheet Transactions

1. High credit risk:
   a) acceptances representing credit substitutes and draft obligations in the form of own drawings in circulation;
   b) obligations of endorsement arising from forwarded bills of exchange;
   c) sureties (including standby letters of credit serving as financial guarantee for loans and securities) and guarantees for asset items;
   d) providing of sureties for liabilities of others;
   e) asset items purchased under outright forward purchase agreements with an unconditional duty to take delivery of the asset items;
   f) forward forward deposits;
   g) sale of asset items with recourse, if the credit risk remains within the selling credit institution;
   h) underwritings for securities;
   i) the unpaid portion of partly paid-up stock and other securities;
   j) put options on assets sold; if the exercise price exceeds the market price of the asset with respect to which the option may be exercized, the exercize price shall be chosen, otherwise the market price of the asset multiplied with the delta of the option.
2. Medium credit risk:
   a) documentary credits issued and confirmed, provided that they are not items with below average credit risk;
   b) performance guarantees (including tender, down payment, payment and purchase price guarantees, customs and tax bonds) and guarantees other than those mentioned in para 1 lit c, and other guarantees and sureties than those referred to in No 1 lit c, even if they are issued in the form of standby letters of credit;
   c) sale and repurchase transactions pursuant to § 50 paras 3 and 5;
   d) obligations to issue or obligations arising from the revolving offering of money market securities by others, in particular from note issuance facilities (NIFs), revolving underwriting facilities (RUFs) and similar instruments;
   e) undrawn credit facilities (agreements to lend, promissory notes, obligations to purchase securities, or to provide guarantees or acceptance facilities) with an original maturity of more than one year and which may not be canceled by the credit institution unconditionally and without notice.
3. Below average credit risk:
   a) opening and confirmation of documentary credits in which documents of title serve as collateral, or other self-liquidating transactions;

b) liability sums for a member of a cooperative; in case of cooperatives with unlimited liability, the thirty-fold amount of the nominal value of the shares shall be used.

4. Low credit risk:
   a) undrawn credit facilities (agreements to lend, promissory notes, obligations to purchase securities, or to provide guarantees or acceptance facilities) with an original maturity of up to and including one year or which may be canceled by the credit institution unconditionally at any time and without notice;
   b) draft obligations in the form of endorsements where the Oesterreichische Nationalbank has assumed the duty under the Agreement of 16 November 1966 with the ERP Fund implementing the Act on the ERP Fund not to enforce its rights arising from the bills of exchange against the authorizing banks and not to circulate these bills of exchange;
   c) all other transactions not listed.

**Annex 2**
to § 22

## Special Off-Balance Sheet Financial Transactions

1. Interest rate contracts
   a) interest rate swaps (in one single currency);
   b) floating/floating interest rate swaps (basis swaps);
   c) forward rate agreements, including purchases of forward forward deposits;
   d) interest rate futures and interest related index contracts;
   e) options purchased on interest based instruments;
   f) other contracts of a similar nature.
2. Contracts concerning foreign exchange rates and gold
   a) cross currency interest rate swaps;
   b) forward foreign exchange contracts;
   c) currency futures and currency related index contracts;
   d) currency options purchased;
   e) contracts concerning gold and other contracts similar to those referred to in Nos a through d.
3. Contracts concerning equities and other securities related contracts (unless already included in No 1)
   a) forward transactions in equities and other securities price related forward transactions;
   b) index contracts in equities and other securities price related index forward transactions;
   c) options purchased in equities and other securities index options;
   d) other contracts of a similar nature concerning equities and other securities.
4. Precious metal contracts not including contracts concerning gold referred to in No 2 (e)
   a) precious metal forward transactions;

b) precious metal futures;
c) precious metal options purchased;
d) other precious metal contracts of a similar nature.

5. Commodities contracts not including contracts concerning precious metals
a) commodities forward transactions;
b) commodities futures;
c) commodities options purchased;
d) other commodities related contracts of a similar nature.

6. Other forward transactions, futures, options purchased and similar transactions not attributable to those referred to in Nos 1 through 5.

**Annex 3**
to § 22

## Multilateral Development Banks

1. International Bank for Reconstruction and Development;
2. International Finance Corporation;
3. Inter-American Development Bank;
4. Asian Development Bank;
5. African Development Bank;
6. Council of Europe Resettlement Fund;
7. Nordic Investment Bank;
8. Caribbean Development Bank;
9. European Bank for Reconstruction and Development;
10. European Investment Fund;
11. Inter-American Investment Corporation.

**Annex 1**
to § 43, part 1

## Form A: Layout of the Balance Sheet of General and Limited Partnerships

**Assets**

1. Cash reserve
a) cash in hand
b) balance with the Oesterreichische Nationalbank and with the Österreichische Postsparkasse
2. Checks, matured securities, interest coupons and dividend coupons
3. Balances with credit institutions
hereof moneys repayable on demand or subject to less than 30 days' notice
hereof moneys subject to between thirty days' and less than six months' notice
4. Bills of exchange
hereof those eligible for rediscount with the Oesterreichische Nationalbank
5. Securities

a) with fixed rates of interest
hereof exchange-listed
b) stocks
hereof exchange-listed
c) others
hereof eligible as collateral with the Oesterreichische Nationalbank
hereof out of own issuance

6. Lendings to credit institutions
hereof with liability of the Federation or the States
7. Lendings to other debtors
a) to the Federation and the States
b) to others
hereof with liability of the Federation or the States
8. Transmitted loans (trust transactions)
9. Participations and syndicate participations
a) in credit institutions
b) in other companies
10. Land and buildings
a) for own business operations
b) others
11. Operations and business equipment
12. Claims against partners
13. Shares held in a controlling or majority-holding company
14. Other assets
15. Deferred items

Sum of Assets

16. Assets abroad
hereof with liability of the Federation or the States
17. Assets subject to disposition restrictions
a) cover funds for funded bank bonds
b) cover funds pursuant to § 230a Civil Code
18. Claims (including recourse claims) against
a) participations in credit institutions
b) participations in other companies
c) the persons named in § 28
19. Total amount of qualifying participations pursuant to § 29 para 2
20. Subordinated claims
21. Contingent claims against
a) credit institutions
b) others
22. Assets sold under a sale and repurchase transaction
hereof sale and repurchase transactions with the Oesterreichische Nationalbank
hereof sale and repurchase transactions with credit institutions
23. Assets bought under a sale and repurchase transaction
hereof from credit institutions

**Liabilities**

1. Savings deposits
   a) due on a daily basis
   b) subject to a period of notice for cancellation of less than six months
   c) subject to a period of notice for cancellation of six months or more
2. Liabilities to credit institutions
   a) arising from the refinancing of export loans with the Oesterreichische Kontrollbank AG
   b) arising from Lombard transactions with the Oesterreichische Nationalbank
   c) arising from other deposits of credit institutions
      hereof moneys repayable on demand or subject to less than thirty days' notice

   hereof moneys subject to between thirty days' and less than six months' notice
3. Liabilities to others
   hereof moneys repayable on demand or subject to less than thirty days' notice
   hereof moneys subject to between thirty days' and less than six months' notice
4. Own acceptances and promissory notes in circulation
5. Own issuings
   a) bonds
   b) deposit certificates
   c) bonus shares
   d) others
6. Transmitted loans (trust transactions)
7. Provisions
   a) provision for pension obligations
      hereof taxed
   b) provision (precaution) for severance payment obligations
   c) other provisions
8. Liabilities to partners
9. Business capital
10. Participation capital pursuant to § 23 para 4
11. Fund for general banking risks pursuant to § 57 para 3
12. Supplementary capital pursuant to § 23 para 7
13. Liability reserve pursuant to § 23 para 6
14. Reserves
    a) tied-up reserve formed with the premium charged when issuing participation capital
    b) reserve pursuant to § 11 Individual Income Tax Act (§ 4 para 7 Income Tax Act 1972)
    c) reserve pursuant to § 12 Individual Income Tax Act
    d) reserve for profit not withdrawn pursuant to § 11 Individual Income Tax Act
    e) investment reserve pursuant to § 9 Individual Income Tax Act

f) investment allowance pursuant to § 10 Individual Income Tax Act
g) valuation reserve on the basis of special write-offs
h) free reserve
j) other reserves

15. Other liabilities
16. Deferred items

Sum of Liabilities

17. Liabilities abroad
18. Contingent liabilities arising from sureties and guarantees
19. Other contingent liabilities arising from
    a) own drawings in circulation
       hereof ERP-bills of exchange
    b) own endorsement obligations
    c) others
20. Liabilities arising from
    a) participations in credit institutions
    b) participations in other companies
21. Savings deposits of wards' money
22. Reserves
    a) capital reserves
    b) profit reserves
23. Own funds to be taken into account pursuant to § 23 in connection with § 29
24. Basis for computation of own funds pursuant to § 22
    hereof weighted assets
    hereof weighted off-balance sheet transactions

## Form B: Layout of the Balance Sheet of Stock Corporations, Limited Liability Companies, as well as of the Österreichische Postsparkasse

**Assets**

1. Cash reserve
   a) cash in hand
   b) balance with the Oesterreichische Nationalbank and with the Österreichische Postsparkasse
2. Checks, matured securities, interest coupons and dividend coupons
3. Balance with credit institutions
   hereof moneys repayable on demand or subject to less than thirty days' notice
   hereof moneys subject to between thirty days' and less than six months' notice
4. Bills of exchange
   hereof those eligible for rediscount with the Oesterreichische National-bank
5. Securities

a) with fixed rates of interest
hereof exchange-listed
b) stocks
hereof exchange-listed
c) others
hereof eligible to serve as collateral with the Oesterreichische Nationalbank
hereof out of own issuance

6. Lendings to credit institutions
hereof with liability of the Federation or the States
7. Lendings to other debtors
a) to the Federation and the States
b) to others
hereof with liability of the Federation or the States
8. Transmitted loans (trust transactions)
9. Participations and syndicate participations
a) in credit institutions
b) in other companies
hereof participations for participation funds
10. Land and buildings
a) for own business operations
b) others
11. Operations and business equipment
12. Outstanding capital contributions to the subscribed capital
hereof contributions called up
13. Own stock or own shares
par value: . . .
14. Shares in a controlling or majority-holding company
15. Other assets
16. Deferred items
17. Net loss
a) loss carryforward / profit carryforward from the preceding year
b) remitted profits
c) annual loss / annual profit

Sum of Assets

18. Assets abroad
hereof with liability of the Federation or the States
19. Assets subject to disposition restrictions
a) cover funds for funded bank bonds
b) cover values for mortgage bonds and municipal bonds
c) cover funds pursuant to § 230a Civil Code
20. Claims (including recourse claims) on
a) participations in credit institutions
b) participations in other companies
c) the persons named in § 28
21. Total amount of qualifying participations pursuant to § 29 para 2

22. Subordinated claims
23. Contingent claims on
    a) credit institutions
    b) others
24. Assets sold under a sale and repurchase transaction
    hereof sale and repurchase transactions with the Oesterreichische Nationalbank
    hereof sale and repurchase transactions with credit institutions
25. Assets bought under a sale and repurchase transaction hereof from credit institutions

**Liabilities**

1. Savings deposits
    a) repayable on demand
    b) subject to a period of notice for cancellation of less than six months
    c) subject to a period of notice for cancellation of six months or more
2. Liabilities to credit institutions
    a) arising from refinancing of export loans with the Oesterreichische Kontrollbank AG
    b) arising from Lombard transactions with the Oesterreichische Nationalbank
    c) arising from other deposits of credit institutions
    hereof moneys repayable on demand or subject to less than thirty days' notice
    hereof moneys subject to between thirty days' and less than six months' notice
3. Liabilities to others
    hereof moneys repayable on demand or subject to less than thirty days' notice
    hereof moneys subject to between thirty days' and less than six months' notice
4. Own acceptances and promissory notes in circulation
5. Own issuings
    a) mortgage bonds
    b) municipal bonds
    c) bonds
    d) deposit certificates
    e) bonus rights, convertible and profit-sharing bonds (§ 174 Stock Corporation Act)
    f) bonus shares within the meaning of the Participating Funds Act
    g) others
6. Transmitted loans (trust transactions)
7. Provisions
    a) provisions for pension obligations
    hereof taxed
    b) provision (precaution) for severance payment obligations
    c) other provisions

8. Subscribed capital
   a) common stock
   b) preferred stock
9. Participation capital pursuant to § 23 para 4
10. Fund for general banking risks pursuant to § 57 para 3
11. Supplementary capital pursuant to § 23 para 7
12. Liability reserve pursuant to § 23 para 6
13. Reserves
    a) statutory reserve
       hereof premium charged when issuing participation capital
    b) reserve pursuant to § 11 Individual Income Tax Act (§ 4 para 7 Income Tax Act 1972)
    c) reserve pursuant to § 12 Individual Income Tax Act
    d) investment reserve pursuant to § 9 Individual Income Tax Act
    e) investment allowance pursuant to § 10 Individual Income Tax Act
    f) valuation reserve on the basis of special write-offs
    g) free reserve
    h) other reserves
14. Other liabilities
15. Deferred items
16. Net profit
    a) profit carryforward / loss carryforward from the preceding year
    b) remitted profits
    c) annual profit / annual loss

Sum of Liabilities

17. Liabilities abroad
18. Contingent liabilities arising from sureties and guarantees
19. Other contingent liabilities arising from
    a) own drawings in circulation
       hereof ERP-bills of exchange
    b) own endorsement obligations
    c) others
20. Liabilities arising from
    a) participations in credit institutions
    b) participations in other companies
21. Savings deposits of wards' money
22. Reserves
    a) capital reserves
    b) profit reserves
23. Own funds to be taken into account pursuant to § 23 in connection with § 29
24. Basis for computation of own funds pursuant to § 22
    hereof weighted assets
    hereof weighted off-balance sheet transactions

## Form C: Layout of the Balance Sheet of Credit Cooperatives

**Assets**

1. Cash reserve
   a) cash in hand
   b) credit balances with the Oesterreichische Nationalbank and the Österreichische Postsparkasse
2. Checks, matured securities, interest coupons and dividend coupons
3. Balances with credit institutions
   hereof moneys repayable on demand or subject to less than thirty days' notice
   hereof moneys subject to between thirty days' and less than six months' notice
4. Bills of exchange
   hereof those eligible for rediscount with the Oesterreichische Nationalbank
5. Securities
   a) with fixed rate of interest
      hereof exchange-listed
   b) stocks
      hereof exchange-listed
   c) others
      hereof eligible as collateral with the Oesterreichische Nationalbank
      hereof out of own issuance
6. Lendings to credit institutions
   hereof with liability of the Federation or the States
7. Lendings to other debtors
   a) to the Federation and the States
   b) to others
      hereof with liability of the Federation or the States
8. Transmitted loans (trust transactions)
9. Participations and syndicate participations
   a) in credit institutions
   b) in other companies
10. Land and buildings
    a) for own business operations
    b) others
11. Operations and business equipment
12. Outstanding contributions to the equity capital not yet paid-up
    hereof contributions called up
13. Shares in a controlling or majority-holding company
14. Assets of the trading business
    a) claims arising from trading transactions
    b) stock in trade
    c) other assets of the trading business
15. Other assets
16. Deferred items
17. Net loss

a) loss carryforward / profit carryforward from the preceding year
b) remitted profits
c) annual loss / annual profit

Sum of Assets

18. Assets abroad
    hereof with liability of the Federation or the States
19. Assets subject to disposition restrictions
    a) cover funds for funded bank bonds
    b) cover funds pursuant to § 230a Civil Code
20. Claims (including recourse claims) on
    a) participations in credit institutions
    b) participations in other companies
    c) the persons named in § 28
21. Total amount of qualifying participations pursuant to § 29 para 2
22. Subordinated claims
23. Contingent claims on
    a) credit institutions
    b) others
24. Assets sold under a sale and repurchase transaction
    hereof sale and repurchase transactions with the Oesterreichische Nationalbank
    hereof sale and repurchase transactions with credit institutions
25. Assets bought under a sale and repurchase transaction
    hereof from credit institutions

**Liabilities**

1. Savings deposits
   a) repayable on demand
   b) with a period of notice for cancellation of less than six months
   c) with a period of notice for cancellation of six months or more
2. Liabilities to credit institutions
   a) arising from the refinancing of export loans with the Oesterreichische Kontrollbank AG
   b) arising from Lombard transactions with the Oesterreichische Nationalbank
   c) arising from other deposits of credit institutions
      hereof moneys repayable on demand or subject to less than 30 days' notice
      hereof moneys subject to between thirty days' and less than six months' notice
3. Liabilities to others
   hereof moneys repayable on demand or subject to less than 30 days' notice
   hereof moneys subject to between thirty days' and less than six months' notice
4. Own acceptances and promissory notes in circulation

5. Own issuings
   a) bonds
   b) deposit certificates
   c) bonus rights
   d) others
6. Transmitted loans (trust transactions)
7. Provisions
   a) provision for pension obligations
      hereof taxed
   b) provision (precaution) for severance payment obligations
   c) other provisions
8. Shares:
   a) of remaining members
   b) of withdrawing members
9. Participation capital pursuant to § 23 para 4
10. Fund for general banking risks pursuant to § 57 para 3
11. Supplementary capital pursuant to § 23 para 7
12. Liability reserve pursuant to § 23 para 6
13. Reserves
    a) reserve pursuant to articles of association
    b) tied-up reserve formed with the premium charged when issuing participation capital
    c) reserve pursuant to § 11 Individual Income Tax Act (§ 4 para 7 Income Tax Act 1972)
    d) reserve pursuant to § 12 Individual Income Tax Act
    e) investment reserve pursuant to § 9 Individual Income Tax Act
    f) investment allowance pursuant to § 10 Individual Income Tax Act
    g) valuation reserve on the basis of special write-offs
    h) free reserve
    i) other reserves
14. Liabilities arising from trading business
15. Other liabilities
16. Deferred items
17. Net profit
    a) profit carryforward / loss carryforward from the preceding year
    b) remitted profits
    c) annual profit / annual loss

Sum of Liabilities

18. Liabilities abroad
19. Contingent liabilities arising from sureties and guarantees
20. Other contingent liabilities from
    a) own drawings in circulation
       hereof ERP-bills of exchange
    b) own endorsement obligations
    c) others
21. Liabilities arising from

a) participations in credit institutions
b) participations in other companies
22. Savings deposits of wards' money
23. Reserves
a) capital reserves
b) profit reserves
24. Own resources to be taken into account pursuant to § 23 in connection with § 29
25. Basis for computation of own funds pursuant to § 22
hereof weighted assets
hereof weighted off-balance-sheet transactions
26. Changes in the number of members, their shares and liability amounts:
a) change of membership
aa) number of members
at the beginning of 19. . .
increase during 19. . .
decrease during 19. . .
at the end of 19. . .
bb) number of shares
at the beginning of 19. . .
increase during 19. . .
decrease during 19. . .
at the end of 19. . .
b) the business balances have in the business year
increased by . . .
decreased by . . .
c) the liability amounts have in the business year
increased by . . .
decreased by . . .
d) amount of the individual shares
e) amount of the liability sum
hereof liability sum surcharge attributed to own funds

## Form D: Layout of the Balance Sheet of State Mortgage Banks

**Assets**

1. Cash reserve
a) cash in hand
b) balance with the Oesterreichische Nationalbank and the Österreichische Postsparkasse
2. Checks, matured securities, interest coupons and dividend coupons
3. Balances with credit institutions
hereof moneys repayable on demand or subject to less than thirty days' notice
hereof moneys subject to between thirty days' and less than six months' notice

4. Bills of exchange
   hereof those eligible for rediscount with the Oesterreichische Nationalbank
5. Securities
   a) with fixed rate of interest
      hereof exchange-listed
   b) stock
      hereof exchange-listed
   c) others
      hereof eligible as collateral with the Oesterreichische Nationalbank
      hereof out of own issuing
6. Lendings to credit institutions
   hereof with liability of the Federation or the States
7. Lendings to other debtors
   a) to the Federation and the States
   b) to others
      hereof with liability of the Federation or the States
8. cover loans
   a) to cover mortgage bonds
      hereof to cover mortgage bonds of the Mortgage Bond Division
   b) to cover municipal bonds
      hereof to cover municipal bonds of the Mortgage Bond Division
9. Interest and contributions to administrative expenses from

| | pro rata | due |
|---|---|---|
| a) borrowings | | |
| b) cover loans secured by mortgages | | |
| c) municipal cover loans | | |

   of the due amounts those due in December
10. Transmitted loans (trust transactions)
11. Participations and syndicate participations
    a) in credit institutions
    b) in other companies
12. Land and buildings
    a) for own business operations
    b) others
13. Operations and business equipment
14. Other assets
15. Deferred items
16. Net loss
    a) loss carryforward / profit carryforward of the preceding year
    b) annual loss / annual profit

Sum of Assets

17. Assets abroad
    hereof with liability of the Federation or the States
18. Cover funds for funded bank bonds
19. Claims (including recourse claims) against

a) participations in credit institutions
b) participations in other companies
c) the persons named in § 28

20. Total amount of qualifying participations pursuant to § 29 para 2
21. Subordinated claims
22. Contingent claims on
    a) credit institutions
    b) others
23. Assets sold under a sale and repurchase transaction
    hereof sale and repurchase transactions with the Oesterreichische Nationalbank
    hereof sale and repurchase transactions with credit institutions
24. Assets bought under a sale and repurchase transaction
    hereof from credit institutions

**Liabilities**

1. Savings deposits
    a) repayable on demand
    b) subject to a period of notice for cancellation of less than six months
    c) subject to a period of notice for cancellation of six months and more
2. Liabilities to credit institutions
    a) arising from the refinancing of export loans with the Oesterreichische Kontrollbank AG
    b) arising from Lombard transactions with the Oesterreichische Nationalbank
    c) arising from other deposits of credit institutions
    hereof moneys repayable on demand or subject to less than thirty days' notice
    hereof moneys subject to between thirty days' and less than six months' notice
3. Liabilities to others
    hereof moneys repayable on demand or subject to less than thirty days' notice
    hereof moneys subject to between thirty days' and less than six months' notice
4. Own acceptances and promissory notes in circulation
5. Own issuings
    a) mortgage bonds
    b) municipal bonds
    c) bonds
    d) deposit certificates
    e) bonus shares
    f) others
6. Obligations to the Mortgage Bond Division
    a) mortgage bonds
    b) municipal bonds
    c) bonds

7. Bonds drawn for redemption or canceled
8. Interest on own issuings

| | pro rata | due |
|---|---|---|
| a) mortgage bonds | | |
| b) municipal bonds | | |
| c) other own issuings | | |

9. Transmitted loans (trust transactions)
10. Provisions
    a) provision for pension obligations
       hereof taxed
    b) provision (precaution) for severance payment obligations
    c) other provisions
11. Participation capital pursuant to § 23 para 4
12. Fund for general banking risks pursuant to § 57 para 3
13. Supplementary capital pursuant to § 23 para 7
14. Liability reserve pursuant to § 23 para 6
15. Reserves
    a) reserve pursuant to articles of association
    b) tied-up reserve formed with the premium charged when issuing participation capital
    c) reserve pursuant to § 11 Individual Income Tax Act (§ 4 para 7 Income Tax Act 1972)
    d) reserve pursuant to § 12 Individual Income Tax Act
    e) investment reserve pursuant to § 9 Individual Income Tax Act
    f) investment allowance pursuant to § 10 Individual Income Tax Act
    g) valuation reserve on the basis of special write-offs
    h) free reserve
    i) other reserves
16. Other liabilities
17. Deferred items
18. Net profit
    a) profit carryforward / loss carryforward from the preceding year
    b) annual profit / annual loss

Sum of Liabilities

19. Liabilities abroad
20. Contingent liabilities arising from sureties and guarantees
21. Other contingent liabilities arising from
    a) own drawings in circulation
       hereof ERP-bills of exchange
    b) own endorsement obligations
    c) others
22. Liabilities arising from
    a) participations in credit institutions
    b) participations in other companies
23. Savings deposits of wards' money
24. Reserves

a) capital reserves
b) profit reserves

25. Own funds to be taken into account pursuant to § 23 in connection with § 29
26. Basis for computation of own funds pursuant to § 22
hereof weighted assets
hereof weighted off-balance sheet transactions

## Form E: Layout of the Balance Sheet of Savings Banks

**Assets**

1. Cash reserve
   a) cash in hand
   b) balance with the Oesterreichische Nationalbank and the Österreichische Postsparkasse
2. Checks, matured securities, interest coupons and dividend coupons
3. Balances with credit institutions
   hereof moneys due daily or subject to less than thirty days' notice
   hereof moneys subject to between thirty days' and less than six months' notice
4. Bills of exchange
   hereof those eligible for rediscount with the Oesterreichische Nationalbank
5. Securities
   a) with fixed rates of interest
      hereof exchange-listed
   b) stocks
      hereof exchange-listed
   c) others
      hereof eligible as collateral with the Oesterreichische Nationalbank
      hereof out of own issuance
6. Lendings to credit institutions
   hereof with liability of the Federation or the States
7. Lendings to other debtors
   a) to the Federation and the States
   b) to others
      hereof with liability of the Federation or the States
8. Transmitted loans (trust transactions)
9. Participations and syndicate participations
   a) in credit institutions
   b) in other companies
10. Land and buildings
    a) for own business operations
    b) others
11. Operations and business equipment
12. Other assets
13. Deferred items

14. Net loss
    a) loss carryforward / profit carryforward from the preceding year
    b) annual loss / annual profit

Sum of Assets

15. Assets abroad
    hereof with liability of the Federation or the States
16. Assets subject to disposition restrictions
    a) cover fund for funded bank bonds
    b) cover funds pursuant to § 230a Civil Code
17. Claims (including recourse claims) arising from
    a) participations in credit institutions
    b) participations in other companies
    c) the persons named in § 28
18. Total amount of qualifying participations pursuant to § 29 para 2
19. Subordinated claims
20. Contingent claims against
    a) credit institutions
    b) others
21. Assets sold under a sale and repurchase transaction
    hereof sale and repurchase transactions with the Oesterreichische Nationalbank
    hereof sale and repurchase transactions with credit institutions
22. Assets bought under a sale and repurchase transaction
    hereof from credit institutions

**Liabilities**

1. Savings deposits
    a) repayable on demand
    b) subject to a period of notice for cancellation of less than six months
    c) subject to a period of notice for cancellation of six months or more
2. Liabilities to credit institutions
    a) arising from the refinancing of export loans by the Oesterreichische Kontrollbank AG
    b) arising from Lombard transactions with the Oesterreichische Nationalbank
    c) arising from other deposits of credit institutions
    hereof moneys repayable on demand or subject to less than thirty days' notice
    hereof moneys subject to between thirty days' and less than six months' notice
3. Liabilities to others
    hereof moneys repayable on demand or subject to less than thirty days' notice
    hereof moneys subject to between thirty days' and less than six months' notice
4. Own acceptances and promissory notes in circulation

5. Own issuings
   a) bonds
   b) deposit certificates
   c) bonus shares
   d) others
6. Transmitted loans (trust transactions)
7. Provisions
   a) provision (precaution) for pension obligations
      hereof taxed
   b) provisions for severance payment obligations
   c) other provisions
8. Participation capital pursuant to § 23 para 4
9. Fund for general banking risks pursuant to § 57 para 3
10. Supplementary capital pursuant to § 23 para 7
11. Liability reserve pursuant to § 23 para 6
12. Reserves
    a) security reserve
    b) tied-up reserve formed with the premium charged when issuing participation capital
    c) special purpose reserve
    d) reserve pursuant to § 11 Individual Income Tax Act (§ 4 para 7 Income Tax Act 1972)
    e) reserve pursuant to § 12 Individual Income Tax Act
    f) investment reserve pursuant to § 9 Individual Income Tax Act
    g) investment allowance pursuant to § 10 Individual Income Tax Act
    h) valuation reserve on the basis of special write-offs
    i) free reserve
    j) other reserves
13. Other liabilities
14. Deferred items
15. Net profit
    a) profit carryforward / loss carryforward from the preceding year
    b) annual profit / annual loss

Sum of Liabilities

16. Liabilities abroad
17. Contingent liabilities arising from sureties and guarantees
18. Other contingent liabilities arising from
    a) own drawings in circulation
       hereof ERP-bills of exchange
    b) own endorsement obligations
    c) others
19. Liabilities arising from
    a) participations in credit institutions
    b) participations in other companies
20. Savings deposits of wards' money
21. Reserves

a) capital reserves
b) profit reserves

22. Own funds to be taken into account pursuant to § 23 in connection with § 29
23. Basis for computation of own funds pursuant to § 22
hereof weighted assets
hereof weighted off-balance sheet transactions

## Form F: Layout of the Balance Sheet of Branch Offices of Foreign Credit Institutions

**Assets**

1. Cash reserve
   a) cash in hand
   b) balance with the Oesterreichische Nationalbank and the Österreichische Postsparkasse
2. Checks, matured securities, interest coupons and dividend coupons
3. Balances with credit institutions
   hereof moneys due daily or subject to less than thirty days' notice
   hereof moneys subject to between thirty days' and less than six months' notice
4. Bills of exchange
   hereof those eligible for rediscount with the Oesterreichische Nationalbank
5. Securities
   a) with fixed rates of interest
      hereof exchange-listed
   b) stocks
      hereof exchange-listed
   c) others
      hereof eligible as collateral with the Oesterreichische Nationalbank
      hereof out of own issuance
6. Lendings to credit institutions
   hereof with liability of the Federation or the States
7. Lendings to other debtors
   a) to the Federation and the States
   b) to others
      hereof with liability of the Federation or the States
8. Transmitted loans (trust transactions)
9. Participations and syndicate participations
   a) in credit institutions
   b) in other companies
10. Land and buildings
    a) for own business operations
    b) others
11. Operations and business equipment
12. Own stock of the head office

13. Shares in a controlling or majority-holding company
14. Other assets
15. Deferred items
16. Net loss
    a) loss carryforward / profit carryforward from the preceding year
    b) annual loss / annual profit

Sum of Assets

17. Assets abroad
    hereof with liability of the Federation or the States
18. Assets subject to disposition restrictions
    a) cover fund for funded bank bonds
    b) cover funds pursuant to § 230a Civil Code
19. Claims against the head office and its branch offices
20. Claims (including recourse claims) – to the extent not included in item 19 – arising from
    a) participations in credit institutions
    b) participations in other companies
    c) the persons named in § 28
21. Total amount of qualifying participations pursuant to § 29 para 2
22. Subordinated claims
23. Contingent claims against
    a) credit institutions
    b) others
24. Assets sold under a sale and repurchase transaction
    hereof sale and repurchase transactions with the Oesterreichische Nationalbank
    hereof sale and repurchase transactions with credit institutions
25. Assets bought under a sale and repurchase transaction
    hereof from credit institutions

**Liabilities**

1. Savings deposits
    a) repayable on demand
    b) subject to a period of notice for cancellation of less than six months
    c) subject to a period of notice for cancellation of six months or more
2. Liabilities to credit institutions
    a) arising from the refinancing of export loans with the Oesterreichische Kontrollbank AG
    b) from Lombard transactions with the Oesterreichische Nationalbank
    c) from other deposits of credit institutions
       hereof moneys due daily or subject to less than thirty days' notice
       hereof moneys subject to between thirty days' and less than six months' notice
3. Liabilities to others
   hereof moneys due daily or subject to less than thirty days' notice

hereof moneys subject to between thirty days' and less than six months notice
4. Own acceptances and promissory notes in circulation
5. Own issuings
   a) bonds
   b) deposit certificates
   c) bonus shares
   d) others
6. Transmitted loans (trust transactions)
7. Provisions
   a) provision for pension obligations
      hereof taxed
   b) provision (precaution) for severance payment obligations
   c) other provisions
8. Endowment capital
9. Participation capital pursuant to § 23 para 4
10. Fund for general banking risks pursuant to § 57 para 3
11. Supplementary capital pursuant to § 23 para 7
12. Liability reserve pursuant to § 23 para 6
13. Reserves
   a) tied-up reserve formed with the premium charged when issuing participation capital
   b) reserve pursuant to § 11 Individual Income Tax Act (§ 4 para 7 Income Tax Act 1972)
   c) reserve pursuant to § 12 Individual Income Tax Act
   d) investment reserve pursuant to § 9 Individual Income Tax Act
   e) investment allowance pursuant to § 10 Individual Income Tax Act
   f) valuation reserve on the basis of special write-offs
   g) free reserve
   h) other reserves
14. Other liabilities
15. Deferred items
16. Net profit
   a) profit carryforward / loss carryforward from the preceding year
   b) annual profit / annual loss

**Sum of Liabilities**

17. Liabilities abroad
18. Contingent liabilities arising from sureties and guarantees
19. Other contingent liabilities arising from
   a) own drawings in circulation
      hereof ERP-bills of exchange
   b) own endorsement obligations
   c) others
20. Liabilities to the head office and its branch offices
21. Liabilities (to the extent they are not to be included in item 20) arising from

a) participations in credit institutions
b) participations in other companies

22. Savings deposits of wards' money
23. Reserves
    a) capital reserves
    b) profit reserves
24. Own funds to be taken into account pursuant to § 23 in connection with § 29
25. Basis for the computation of own funds pursuant to § 22
    hereof weighted assets
    hereof weighted off-balance sheet transactions

## Form G: Layout of the Profit and Loss Account

1. Interest and interest-like earnings from
   a) credit and investment transactions
   b) securities
   c) participations
2. (–) Interest and interest-like expenditures from
   a) deposit transactions
   b) own issuings

I. NET INTEREST EARNINGS

3. (+/–) Services
   a) commissions and other earnings
   b) commissions and other expenditures

II. OPERATING EARNINGS

4. (–) Staff expenditures
   hereof:
   a) wages and salaries
   b) expenditure for statutory social levies and compulsory contributions
   c) other social expenditures
   d) expenditures for old-age care and support
   e) endowment of the pension provision
   f) endowment of the severance payment provision
5. (–) Other operating expenditures
   hereof: expenditures for rent and leasing
6. (–) Depreciations and value adjustments of tangible assets
7. (–) Taxes and levies (to the extent they are not to be included in items 4 and 25)

III. OPERATING EXPENDITURES

IV. PARTIAL OPERATING RESULT

8. (+) Ordinary earnings from transactions unrelated to banking business
9. (–) Ordinary expenditures arising from transactions unrelated to banking business

10. (+/–) Earnings/expenditures arising from the valuation and sale of borrowings and securities as well as from commercial transactions
11. (+/–) Earnings/expenditures arising from the valuation and sale of participations
12. (–) Other extraordinary expenditures
13. (+) Other extraordinary earnings
14. (+/–) Balance of other earnings/expenditures

## Trading Activities of Credit Cooperatives

15. (+) Ordinary earnings
16. (–) Ordinary expenditures
17. (+/–) Operating result of the trading business
18. (+) Extraordinary earnings
19. (–) Extraordinary expenditures
20. (+/–) Extraordinary result of the trading business
21. ANNUAL SURPLUS / ANNUAL DEFICIT FROM THE TRADING BUSINESS
22. (–) Expenditures arising from the assumption of losses
23. (–) Endowment of the fund for general banking risks
24. (+) Dissolution of the fund for general banking risks

V. ANNUAL SURPLUS / ANNUAL DEFICIT (before taxes and changes in reserves)

25. (–) Taxes on income, earnings and assets

VI. ANNUAL SURPLUS/ANNUAL DEFICIT (before changes in reserves)

26. Changes in reserves

| | Endowment (–) | reduction (+) |
|---|---|---|
| a) liability reserve | | |
| b) statutory reserve | | |
| c) general reserve fund | | |
| d) security reserve | | |
| e) reserve pursuant to articles of association | | |
| f) special purpose reserve | | |
| g) tax reserves according | | |
| § 4 para 7 Individual Income Tax Act | | |
| § 9 Individual Income Tax Act | | |
| § 10 Individual Income Tax Act | | |
| § 11 Individual Income Tax Act | | |
| § 12 Individual Income Tax Act | | |
| j) free reserve | | |
| k) other reserves | | |
| Balancechanges in reserves | | |

VII. ANNUAL PROFIT / ANNUAL LOSS

27. (+/–) Profit carryforward/loss carryforward
28. (–) Profits remitted on the basis of a profit pool arrangement, a contract to transfer profits or a contract to transfer part of profits

VIII. NET PROFIT / NET LOSS

**Annex 2**
to § 43, part 1

## Layout of the Balance Sheet

**Assets**

1. Cash in hand, balances with central banks and post office banks
2. Debt instruments issued by public bodies and bills of exchange which are eligible for refinancing with the central bank:
   a) debt instruments issued by public bodies and similar securities
   b) bills of exchange which are eligible for refinancing with central banks
3. Claims against credit institutions:
   a) due on a daily basis
   b) other claims
4. Claims against customers
5. Bonds and other fixed income securities
   a) of public issuers
   b) of other issuers
   hereof:
   own bonds
6. Stocks and other non fixed income securities
7. Participations
   hereof:
   in credit institutions
8. Shares in affiliated companies
   hereof:
   in credit institutions
9. Intangible fixed assets
10. Tangible assets
    hereof:
    land and buildings used by the credit institution in the course of its own business
11. Own stock or shares as well as shares held in a controlling company or in a majority participation company
    hereof:
    nominal value
12. Other assets
13. Subscribed capital called-up, but not yet paid-up
14. Deferred items

Sum of Assets

**Balance Sheet Sub-Items**

1. Assets abroad

**Liabilities**

1. Liabilities to credit institutions
   a) repayable on demand
   b) with agreed maturity dates or period of notice
2. Liabilities to customers
   a) savings deposits
      hereof:
      aa) repayable on demand
      bb) with agreed maturity or period of notice
   b) other liabilities
      hereof:
      aa) repayable on demand
      bb) with agreed maturity or period of notice
3. Liabilities evidenced by securities
   a) bonds issued
   b) other liabilities evidenced by securities
4. Own funds taken into account pursuant to § 23 para 14 hereof: own funds pursuant to § 23 para 14 No 7
5. Required own funds pursuant to § 22 para 1 hereof: required own funds pursuand to § 22 para 1 No 1 and 4
6. Provisions
   a) provisions for severance payments
   b) provisions for pension payments
   c) provisions for tax payments
   d) other provisions

6 A. Fund for general banking risks

7. Subordinated liabilities
8. Supplementary capital
9. Subscribed capital
10. Capital reserves
    a) tied-up
    b) free
11. Profit reserves
    a) statutory reserve
    b) reserve according to articles of association
    c) other reserves
12. Liability reserve pursuant to § 23 para 6 Banking Act
13. Net profit / net loss
14. Tax-free reserves
    a) valuation reserve on the basis of special write-offs
    b) other tax-free reserves
       hereof:
       aa) investment reserve pursuant to § 9 Individual Income Tax Act

bb) investment allowance pursuant to § 10 Individual Income Tax Act
cc) rent reserve pursuant to § 11 Individual Income Tax Act
dd) transfer reserve pursuant to § 12 Individual Income Tax Act

Sum of Liabilities

**Balance Sheet Sub-Items**

1. Contingent liabilities
   hereof:
   a) acceptances and endorsement obligations from circulated bills of exchange
   b) obligations from sureties and liability arising from the provision of collateral
2. Credit risks
   hereof:
   liabilities from sale and repurchase transactions
3. Liabilities from trust transactions
4. Own funds to be taken into account pursuant to § 23
5. Required own funds pursuant to § 22 para 1
6. Liabilities abroad
7. Hybrid capital pursuant to § 24 para 2 Nos 5 and 6

**Annex 2**
to § 43, part 2

## Layout of the Profit and Loss Account

1. Interest and interest-like earnings
   hereof:
   fixed interest securities
2. Interest and interest-like expenditures

I. NET INTEREST EARNINGS

3. Earnings from securities and participations
   a) earnings form stock, other shares and variable income securities
   b) earnings from participations
   c) earnings from shares in affiliated companies
4. Earnings from commissions
5. Expenditures for commissions
6. Earnings/expenditures from financial transactions
7. Other operating earnings

II. OPERATING EARNINGS

8. General administrative expenditures
   a) personnel expenditures
      hereof:
      aa) wages and salaries

bb) payments of legal social levies and compulsory contributions
cc) other social expenditures
dd) expenditures for old-age care and assistance
ee) endowment of the pension provision
ff) endowment of the severance compensation provision
b) Other administrative expenditures (overhead)
9. Value adjustments of the assets listed in asset items 9 and 10
10. Other operating expenditures

III. OPERATING EXPENDITURES

IV. OPERATING RESULT

11. Value adjustments of claims and allocations to provisions for contingent liabilities and for credit risks
12. Earnings from the dissolution of value adjustments of claims and from provisions for contingent liabilities and for credit risks
13. Value adjustments of securities valued like financial investments as well as of participations and shares held in affiliated companies
14. Earnings from value adjustments of securities valued like financial assets as well as of participations and shares held in affiliated companies

V. RESULT OF ORDINARY BUSINESS OPERATION

15. Extraordinary earnings
withdrawals from the fund for general banking risks
16. Extraordinary expenditures
contributions to the fund for general banking risks
17. Extraordinary result (subtotal of items 15 and 16)
18. Income and earnings tax
19. Other taxes insofar as they are not to be shown in item 18

VI. ANNUAL SURPLUS / ANNUAL LOSS

20. Change of reserves

VII. ANNUAL PROFIT / ANNUAL DEFICIT

21. Profit carryforward / loss carryforward

VIII. NET PROFIT / NET LOSS

**Annex**
to § 73 para 6

Key data sheet on basic data of foreign credit institutions subject to a full consolidation duty pursuant to § 59 and § 59a

☐ Total Notice ☐ New Opening respectively Purchase ☐ Closing respectively Sale ☐ Other Change

Banking code of the superordinate credit institution
Effective date
Banking code / commercial registry number
Bank/company name

Legal form
Adress: Seat
Street
Post Office Box
Zip Code
Town
Country
Telephone Number
Telefax
E-mail-address
Internet homepage address
SWIFT-address
Ö-NACE-Code
Number of employees

| | Familiy name, first name, title, date of birth | Function |
|---|---|---|
| Organs | | |
| | | |

## Regulations Implementing the Banking Act

- Regulation on the Protection of Moneys Held in Trust for Wards, BGBl No 650/1993
- First Regulation on Liquidity, BGBl No 771/1993
- Regulation on Reporting Major Loans, BGBl No 772/1993, as amended by BGBl Nos 31/1997 and 394/1998
- Regulation on the Bank Supervision Audit Report, BGBl No 119/1994, as amended by BGBl II Nos 30/1997, 181/1997, 387/1998, 378/1999, 231/2000, 322/2000 and 447/2001
- Second Regulation on the Blocking of Accounts, BGBl No 285/1994, expired on April 6, 1999 pursuant to BGBl II No 195/1999
- Regulation on the List of Multilateral Development Banks, BGBl No 730/1994
- Second Regulation on Quarterly Reports, BGBl II No 369/2001
- Regulation on the Reporting of Reserves, BGBl No 970/1994, *as amended by BGBl II No 395/1998*
- Regulation on the Second Amendment of the List of Multilateral Development Banks, BGBl No 255/1996
- Regulation on Internal Models for the Limitation of Market Risks, BGBl II No 179/1997, as amended by BGBl II 321/2000
- Sixth Regulation on Monthly Reports, BGBl II No 447/2001
- Regulation on Other Risks Associated With Options, BGBl II No 37/1998, as amended by BGBl II No 396/1998 and BGBl II 323/2000
- Fourth Regulation on Liquidity, BGBl II No 14/1999

# Part II
# The Austrian Financial Market Authority Act

# Federal Law on the Institution and Organization of the Financial Market Authority (Financial Market Authority Act – FMABG), BGBl I No 97/2001 as amended by BGBl I No 45/2002

## Financial Market Authority

**§ 1.** (1) **(Provision in the rank of constitutional law)** The supervision of banks, insurance companies, securities transactions and pension funds shall be carried out by a legal entity under public law with own legal personality and with the designation Financial Market Authority (FMA). In performing its tasks it shall not be bound by any instructions.

(2) The seat of the FMA is Vienna. Its jurisdiction extends to the entire federal territory. It is authorized to use the federal emblem.

(3) The provisions of the Trade Act 1994 (*Gewerbeordnung* – GewO 1994, BGBl No 194/1994) shall not apply to the FMA.

**§ 2.** (1) Supervision of banks shall include performing the regulatory tasks and powers set forth in the Banking Act (*Bankwesengesetz* – BWG, BGBl No 532/1993, Art I), in the Savings Banks Act (*Sparkassengesetz* – SpG, BGBl No 64/1979), in the Housing Construction Savings and Loan Associations Act (*Bausparkassengesetz* – BSpG, BGBl No 532/1993, Art III), in the Introductory Regulation to the Mortgage Banks and Mortgage Bonds Act (*Einführungsverordnung zum Hypothekenbank- und zum Pfandbriefgesetz,* dRGBl 1938 I p 1574), in the Mortgage Banks Act (*Hypothekenbankgesetz,* dRGBL 1899 p 375), in the Mortgage Bonds Act (*Pfandbriefgesetz,* dRGBl 1927 I p 492), in the Statute on the Preservation of the Rights of the Owners of Mortgage Bonds (*Gesetz betreffend die Wahrung der Rechte der Besitzer von Pfandbriefen,* RGBl No 48/1874), in the Statute on Funded Bank Bonds (*Bankschuldverschreibungsgesetz,* RGBl No 213/1905), in the Investment Funds Act (*Investmentfondsgesetz,* BGBl No 532/1993, Art II), in the Depository Act (*Depotgesetz,* BGBl No 424/1969), in the Participation Funds Act (*Beteiligungsfondsgesetz,* BGBl No 111/1982), and in the E-Money Act (*E-Geldgesetz,* BGBl I No 45/2002) and assigned to the FMA.

(2) Supervision of insurance companies shall include performing the regulatory tasks and powers set forth in the Act on the Supervision of Insurance Companies (*Versicherungsaufsichtsgesetz* – VAG, BGBl No 569/1978) and in the Motor Vehicles Liability Insurance Act (*Kraftfahrzeug-Haftpflichtversicherungsgesetz* 1994, BGBl No 651/1994) and assigned to the FMA.

(3) Supervision of securities transactions shall include performing the regulatory tasks and powers set forth in the Act on the Supervision of Securi-

ties Transactions (*Wertpapieraufsichtsgesetz* – WAG, BGBl No 753/1996) and in the Stock Exchange Act (*Börsegesetz* 1989 – BörseG, BGBl No 555/1989) and assigned to the FMA.

(4) Supervision of pension funds shall include the performing of the tasks and powers set forth in the Pension Funds Act (*Pensionskassengesetz* – PKG, BGBl No 281/1990) and in the Works Pension Act (*Betriebspensionsgesetz* – BPG, BGBl No 282/1990) and assigned to the FMA.

**§ 3.** *(Repealed by federal law BGBl I No 45/2002.)*

**Organs**

**§ 4.** Organs of the FMA are:

1. the Management Board,
2. the Supervisory Board.

**Management Board**

**§ 5.** (1) The Management Board of the FMA shall consist of two members.

(2) The members of the Management Board shall be appointed by the President of the Republic upon a proposal by the Federal Government; reappointment shall be possible. The term of office shall be three years in the case of a first time appointment as a member of the Management Board and five years in case of a reappointment.

(3) Prior to appointing members of the Management Board the Federal Minister of Finance shall procure a tender; the Tender Act (*Ausschreibungsgesetz* 1989, BGBl No 85/1989) shall apply. Based on the results of the tender procedure, the following entities shall have the right to name members for the proposal of the Federal Government under para 2 from among the candidates:

1. when appointing the first Management Board of the FMA, the Federal Minister of Finance and the Oesterreichische Nationalbank: one person each,
2. whenever new Management Board members are appointed, the institution that has named the Management Board member whose termination of office (§ 7 para 1) necessitates the appointment of a new Management Board member: one person.

The Federal Minister of Finance is responsible for making the motion for the resolution of the Federal Government on the persons to be nominated by it for appointment; with respect to the Management Board member to be named by the Oesterreichische Nationalbank, the Federal Minister of Finance shall be bound by the nomination of the Oesterreichische Nationalbank.

(4) Only persons knowledgeable in at least one of the areas of supervision listed in § 2 and not excluded from eligibility to the National Council may be appointed as members of the Management Board. They may exercise their function only on a full time basis.

**§ 6.** (1) The Management Board is responsible for handling the entire office administration and business of the FMA. The Management Board shall represent the FMA in and out of court.

(2) The Management Board shall adopt Rules of Procedure which require the approval of the Supervisory Board. In the Rules of Procedure it shall be ensured that the FMA carries out its tasks in a legal, efficient, economic and cost saving manner and that the employees of the FMA receive appropriate assignments. The Rules of Procedure shall in particular also provide to what extent the Management Board, notwithstanding its responsibility for the management of the FMA, may be represented by employees of the FMA in taking decisions or decrees or other official acts. In the organisational structure and the Rules of Procedure, the professional characteristics and distinctive goals of the different areas to be supervised shall be adequately taken into consideration. Sectoral characteristics shall be taken into account, as far as possible.

(3) The Rules of Procedure pursuant to para 2 as amended from time to time shall, together with signature samples of the employees authorized by the Rules of Procedure to represent the FMA, be available for public inspection in the offices of the FMA. The Rules of Procedure shall also be made available on the homepage of the FMA.

(4) The Management Board shall adopt a compliance code to be approved by the Supervisory Board. The compliance code shall contain operating guidelines for treating private transactions between members of the Management Board, the Supervisory Board and employees of the FMA on the one hand and the supervised institutions on the other hand.

(5) The Management Board shall report to the Supervisory Board on a quarterly basis on the general development of the financial market and on the supervisory activities in the reporting period. It shall furthermore report on the planned supervision policy and on the main areas of activity envisaged for the following reporting period.

**§ 7.** (1) The function of a Management Board member of the FMA shall terminate

1. when the term of office ends,
2. with the consent of the Supervisory Board upon resignation for important reasons,
3. upon recall pursuant to para 3.

(2) The member of the Management Board who intends to resign shall inform the Supervisory Board, the Federal Minister of Finance and the Oesterreichische Nationalbank as soon as possible in writing and shall cite the reasons therefore. If the Supervisory Board accepts the resignation, it shall immediately inform the Federal Minister of Finance and the Oesterreichische Nationalbank thereof in writing together with the effective date of the resignation of the Management Board member. The Federal Minister of Finance shall initiate the appointment of a new member pursuant to § 5. In case the newly appointed Management Board member should take office

only after the former member has left office, a suitable substitute member shall be appointed without delay for the duration of the vacancy by the Federal Minister of Finance upon the recommendation of the Supervisory Board; in this case § 5 shall not apply. The aforementioned provisions on the appointment of a new Management Board Member and on the appointment of a substitute member shall also apply in case of a recall pursuant to para 3.

(3) The Federal Minister of Finance shall recall a member of the Management Board if an important reason exists, such as in particular

1. lapse of an appointment condition, or
2. subsequent knowledge that an appointment condition never existed, or
3. gross violation of duty, or
4. permanent disability, or if the member concerned has been absent from work for more than half a year due to sickness, accident or a disability, or
5. if despite supervisory measures pursuant to § 11 para 2 violations of duty have not been effectively remedied.

The Federal Minister of Finance shall hear the Oesterreichische Nationalbank before recalling a member it has nominated; in case of imminent danger, however, the member of the Management Board shall be recalled immediately, the Oesterreichische Nationalbank being notified simultaneously.

**Supervisory Board**

**§ 8.** (1) The Supervisory Board of the FMA shall consist of a Chairman, a Vice-Chairman, four additional members and two co-opted members. The Chairman, the Vice-Chairman and the other members of the Supervisory Board with the exception of the co-opted members shall be appointed by the Federal Minister of Finance. The Oesterreichische Nationalbank shall submit nominations for the functions of the Vice-President and two additional members of the Supervisory Board. The Supervisory Board shall in addition co-opt two members nominated by the Federal Economic Chamber who shall, however, have no right to vote. Only capable and reliable persons that are not excluded from eligibility to the National Council may be appointed or co-opted as members of the Supervisory Board.

(2) The term of office of the members of the Supervisory Board shall be five years; reappointment is possible.

(3) The function of a member of the Supervisory Board shall end:

1. when the term of office ends,
2. upon resignation,
3. upon recall pursuant to para 4.

In the cases of Nos 2 and 3 a new member shall be appointed or co-opted without delay for the duration of the remaining term of office of the member that has left; if a member nominated by the Oesterreichische Nationalbank or the Federal Economic Chamber leaves prematurely, these entities have to nominate a new member immediately.

(4) The Federal Minister of Finance shall recall members of the Supervisory Board in the following instances:

1. lapse of an appointment condition, or
2. subsequent knowledge that an appointment condition never existed, or
3. permanent disability to perform his function, or
4. gross violation of duty.

The Federal Minister of Finance shall hear the Oesterreichische Nationalbank or the Federal Economic Chamber, respectively, before recalling a member nominated by one of these institutions; in case of imminent danger, however, the Supervisory Board member shall be recalled immediately, the Oesterreichische Nationalbank or the Federal Economic Chamber being notified simultaneously.

**§ 9.** (1) The Chairman (Vice-Chairman) of the Supervisory Board shall at least once every quarter and in important cases without delay call a meeting of the Supervisory Board with an agenda. The meeting shall take place within two weeks of its calling. Co-opted members shall, however, have the right to participate in the meetings only to the extent matters pursuant to § 10 para 2 Nos 1 through 4, 8 or 9 are up for deliberation or resolution.

(2) Each voting member of the Supervisory Board, the Management Board and the Federal Minister of Finance may ask for the immediate calling of the Supervisory Board on important grounds.

(3) The Supervisory Board has a quorum if at least four members with voting rights including the Chairman or the Vice-Chairman are present. The Supervisory Board passes its resolutions with a simple majority. In the case of parity of votes cast, the chairman of the meeting shall have the deciding vote. Abstentions are not permitted.

(4) Minutes shall be kept on the meetings of the Supervisory Board. They shall be signed by the chairman of the meeting; the Rules of Procedure of the Supervisory Board shall contain further rules.

(5) Circular resolutions may be passed only in justified exceptional circumstances and only if no member of the Supervisory Board objects thereto. The co-opted members of the Supervisory Board may object to the taking of circular resolutions only if resolutions pursuant to § 10 para 2 Nos 1 through 4, 8 or 9 are to be taken and unless the passing of a circular resolution is necessary to avoid serious harm. Circular resolutions may be passed only with the majority of all members of the Supervisory Board entitled to vote. Abstentions are not permitted. Circular resolutions shall be recorded in writing by the Chairman (Vice-Chairman), the result shall be reported in the following meeting of the Supervisory Board.

**§ 10.** (1) The Supervisory Board shall supervise the management of the FMA. § 95 paras 2 and 3 Stock Corporation Act 1965 (*Aktiengesetz* – AktG, BGBl No 98/1965), shall apply.

(2) Management tasks of the FMA may not be transferred to the Supervisory Board. The following measures require, however, the approval of the Supervisory Board:

1. the financial plan to be drawn up by the Management Board including the investment and staff plan;
2. investments, to the extent they are not authorized in the investment plan and the taking out of loans that exceed € 75,000 each;
3. the acquisition, disposal and encumbrance of real estate;
4. the annual financial statements to be drawn up by the Management Board;
5. the Rules of Procedure pursuant to § 6 para 2 and their amendment;
6. the compliance code pursuant to § 6 para 4 and changes thereto;
7. the appointment of employees of the FMA to leading functions directly subordinated to the Management Board (second management level) as well as their removal and termination;
8. the annual report to be drawn up pursuant to § 16 para 4;
9. the conclusion of collective bargaining and shop agreements.

(3) Prior to the adoption of collective bargaining agreements and shop agreements (para 2 No 9) the labor representation competent for FMA-employees shall be heard.

(4) The voting members of the Supervisory Board are entitled to an adequate remuneration to be paid out of funds of the FMA. The amount of the remuneration shall be determined by the Federal Minister of Finance after hearing the Oesterreichische Nationalbank.

**§ 11.** (1) The Supervisory Board shall, if it learns of the existence of a removal ground for a Management Board member pursuant to § 7 para 3, communicate this fact without delay to the Federal Minister of Finance, unless para 2 should apply.

(2) If a Management Board member violates provisions of this federal law, or of the federal laws to be enforced by the FMA pursuant to § 2, or of the Rules of Procedure, and this does not already constitute a gross violation of duty pursuant to § 7 para 3 No 3, the Supervisory Board shall ask the member concerned in writing to immediately restore the lawful state and to refrain from committing any violations of duty in the future. In case of repetition or continuation the Supervisory Board shall inform the Federal Minister of Finance in view of § 7 para 3, unless such action would appear excessive in light of the type and gravity of the violation.

**§ 12.** The Supervisory Board shall adopt Rules of Procedure that require the approval of the Federal Minister of Finance. The Supervisory Board shall conclude employment contracts with the Management Board members and appoint the auditor. The Supervisory Board is furthermore competent for discharging the members of the Management Board in connection with the approval of the annual financial statements (§ 10 para 2 No 4).

### Financial Market Committee

**§ 13.** (1) A Financial Market Committee shall be established at the Federal Ministry of Finance in order to promote the cooperation and exchange of opinions as a platform by the institutions jointly responsible for the

stability of the financial markets. This Committee shall consist of one representative each of the FMA, of the Oesterreichische Nationalbank and of the Federal Minister of Finance who is engaged in legislative drafting in the area of supervision of financial markets. For each representative of the mentioned institutions, a deputy shall also be appointed.

(2) The Financial Market Committee may with a simple majority of votes issue recommendations on questions relating to the financial market. Following its establishment, the Financial Market Committee shall unanimously adopt Rules of Procedure. The Federal Minister of Finance shall appoint a Chairman (Vice-Chairman) from among the members of the Financial Market Committee for a period of three years; reappointment shall be permissible.

(3) The Financial Market Committee shall be convened at least four times every calendar year by its Chairman, until his appointment by the Federal Minister of Finance. Upon the proposal of two members, it shall also convene on short notice. The Financial Market Committee is authorized to invite also external experts to attend the meetings as advisors.

(4) The members of the Financial Market Committee shall maintain secrecy vis-à-vis everybody on all matters that have become known to them exclusively by virtue of their activity in the Financial Market Committee, when maintaining secrecy is in the interest of preserving public peace, order and security, comprehensive state defense, external relations, in the economic interest of a public law corporation, required in the preparation of a decision or in the predominant interest of the parties.

**Personnel**

**§ 14.** (1) The Management Board of the FMA is authorized to hire the required number of personnel by employment contract. To the extent § 15 does not provide otherwise, the Employees Act (*Angestelltengesetz* – AngG, BGBl No 292/1921) and the other legal provisions applicable to employees in the private economy shall apply to the labor relationship of the employees. The Management Board may furthermore terminate employment relationships pursuant to labor regulations, in particular by giving notice. Giving notice to and relieving of their functions heads of the second management level requires the approval of the Supervisory Board. When heads of the second management level are summarily dismissed, the Chairman of the Supervisory Board shall be informed simultaneously.

(2) The employees of the FMA shall maintain secrecy vis-à-vis any person to whom they are not bound to report in an administrative context on all matters that have become known to them exclusively by virtue of their activity in the Financial Market Committee, when maintaining secrecy is in the interest of preserving public peace, order and security, comprehensive state defence, external relations, in the economic interest of a public law corporation, required in the preparation of a decision or in the predominant interest of the parties. The organs of the FMA und their employees shall furthermore be bound by the duty to preserve banking secrecy as official secrecy pursuant to § 38 para 1 Banking Act (BWG). The Management Board of the FMA may

release employees of the FMA from the obligation to maintain secrecy; § 46 paras 2, 3 and 4 of the Civil Servants Employment Act (*Beamten-Dienstrechtsgesetz* 1979, BGBl No 333/1979) shall apply.

(3) The FMA shall provide for adequate legal protection of its employees entrusted with supervision matters in case of tort claims brought against them as a result of the exercise of their supervisory function.

**Transition of Employees of the Federal Ministry of Finance**

**§ 15.** (1) Starting April 1, 2002, the following shall apply to federal employees assigned to work on March 1, 2002 in Section V/D as well as in Departments V/4, V/5, V/6, V/10, V/12 and V/13 and to the respective secretarial offices of the Federal Ministry of Finance:

1. Civil servants shall be assigned for permanent duty to the FMA effective April 1, 2002;
2. Employees under contract shall be assigned by employer's declaration on the part of the Federal Minister of Finance to the FMA for permanent employment within one month following March 1, 2002. They thereby become employees of the FMA.

(2) For civil servants pursuant to para 1 No 1 a personnel unit as their office shall be established at the FMA. This office shall be subordinated directly to the Federal Ministry of Finance and shall be managed by the Management Board member of the FMA, who has been nominated by the Federal Minister of Finance pursuant to § 5 para 3. This Management Board member shall in this function be bound by the instructions of the Federal Minister of Finance.

(3) The civil servants referred to in para 1 No 1 shall, if they declare prior to March 31, 2007 their resignation from the federal civil service, have the right to be employed by the FMA, effective with the first day of the month following the resignation and pursuant to the provisions applicable after this date to newly starting employees. The time spent in the federal civil service shall be taken into account when calculating claims dependent on the duration of employment.

(4) For the civil servants listed in para 1 No 1 the FMA shall pay to the Federation the total expenditure for their activity including ancillary costs as well as a contribution to cover pension costs. This amount shall be 31,8% of the expenditure for active pay. Active pay shall be all monetary payments from which a pension contribution has to be made. Pension contributions withheld from civil servants shall be taken into account. In the case of a future change in the amount of the pension contributions of federal civil servants pursuant to § 22 Salary Act 1956, BGBl No 54, the percentage of the pension contribution shall change in the same amount. Special pension fund contributions and referral contributions paid to the FMA after March 31, 2002 shall be paid in full to the Federation without delay. Transfer contributions pursuant to § 311 ASVG shall be borne by the FMA. The other payments to the Federation shall be due on the tenth of the respective month.

(5) For employees pursuant to para 1 No 2 the provisions applicable to contractual employment relationships with the Federation, in particular the Contractual Employment Act (*Vertragsbedienstetengesetz* 1948, BGBl No 86) shall continue to apply; special contractual provisions pursuant to § 36 Contractual Employment Act 1948 are no longer permissible. Employees pursuant to para 1 No 2 shall, if they declare their willingness, within one year after the collective bargaining agreement for new employees or a works agreement or individual agreement based on it has become effective, to resign from their employment relationships under the rules that continue to apply to them, have a claim for simultaneous employment with the FMA pursuant to the provisions applicable to new employees. A claim for severance pay does not arise in the context of this resignation. The employment term of the previous employment shall in this case be taken into account for term dependent claims.

(6) For satisfaction of financial claims of employees pursuant to para 1 No 2 and para 3 the Federation shall be liable as default guarantor (§ 1356 ABGB). The amount of liability shall be limited with the amount resulting on the day before a person resigns from the federal civil service from a calculation of this person's payroll position in view of his function at that time, his time of service and his projected regular advancements.

(7) Claims of the Federation against employees that become employees of the FMA pursuant to para 1 No 2 or para 3, shall transfer to the FMA when the employment relationship with the FMA is formed and shall be refunded to the Federation by the FMA.

(8) Accrued claims for severance payment and jubilee payments of employees that become employees of the FMA pursuant to para 1 No 2 or para 3, shall be assumed by the FMA.

(9) The FMA is obligated to provide to the Federal Minister of Finance all documents necessary for drawing up the draft federal budget and the federal budget report concerning the contribution pursuant to para 4.

(10) As employer, the FMA may enter into collective bargaining agreements.

### Supervision of the FMA by the Federal Minister of Finance

**§ 16.** (1) The Federal Minister of Finance shall exercise his supervision over the FMA ensuring that the FMA fulfills its statutory duties, does not breach the laws and regulations when performing its functions and does not exceed its scope of authority.

(2) The Federal Minister of Finance is authorized to seek from the FMA information on all matters relating to the supervision of the financial market for the purpose stated in para 1. The FMA shall provide the Federal Minister of Finance with the required information without delay, in any event no later than within two weeks. When issuing regulations, the FMA shall inform the Federal Minister of Finance of its intention to do so in advance and shall, prior to their issuing, communicate to the Federal Minister of Finance the regulations together with the result of the consultation with the Oesterreichische Nationalbank.

(3) The FMA shall within four months after the end of each calendar year submit to the Finance Committee of the National Council and to the Federal Minister of Finance a report on the expired calendar year. This report shall include in particular an overview of the supervisory activity and the status of the financial economy. The Finance Committee shall have the right to summon the Management Board of the FMA to meetings of the Committee and to seek information, unless this is barred by statutory duties of confidentiality.

(4) The Federal Minister of Finance is authorized to commission the FMA with conducting audits pursuant to the federal laws listed in § 2; the Management Board shall report thereon to the Supervisory Board without delay. The Management Board shall without delay report to the Federal Minister of Finance and to the Supervisory Board on the audit measures performed and on the audit's results.

**Financial Plan**

**§ 17.** (1) The Management Board of the FMA shall for each business year draw up a financial plan including an investment and staff plan to be submitted to the Supervisory Board for approval and representing a binding basis for budgetary and staff management.

(2) The financial plan shall include the full amounts (gross), shown separately, of all revenues and expenses of the FMA expected in the next business year. The expected amounts shall be calculated or estimated, if a calculation is impossible.

(3) The possible number of employees of the FMA shall be determined by the staff plan of the annual financial plan. Staff positions may be provided for only in the type and number necessary to fulfill the tasks of the FMA.

(4) The financial plan for the following business year, including the investment and staff plan together with explanations shall be presented for approval by the Supervisory Board no later than October 31 of the current business year. The Supervisory Board shall decide on the financial plan without delay, but no later than December 15 of the current business year.

(5) The Management Board shall report to the Supervisory Board every quarter on its compliance with the financial plan including the investment and staff plan. If it is expected that the budgeted amounts will be exceeded by more than 5% per accounting unit, the respective measures may be taken only if the Supervisory Board has approved them.

(6) Claims or liabilities shall not be established by a binding basis stated in the financial plan, the investment plan or the staff plan.

(7) The Management Board shall submit to the members of the Supervisory Board and to the institutions liable to pay the costs via their statutory interest group representative without delay, as a rule two weeks prior to the respective meeting of the Supervisory Board, pertinent information on the essential positions of the financial plan, the investment plan and the staff plan. If applicable, the Management Board shall point out information subject to a duty to maintain official secrecy. The institutions liable to pay the costs are entitled to comment on the submitted information via their statutory interest

group representative as well as via the expert division existing within that interest group. The Management Board shall bring such comments to the attention of the Supervisory Board without delay.

### Annual Financial Statements

**§ 18.** (1) The FMA shall draw up for the past business year the annual financial statements in the form of an annual balance sheet and the profit and loss account, respecting the terms pursuant to para 3. The provisions of the third book of the Commercial Code (*Handelsgesetzbuch* – HGB, dRGBl 1897 p 219) shall apply to the annual financial statements, unless this federal law provides otherwise.

(2) The annual financial statements and the statement of costs pursuant to § 19 para 1 shall be audited by an auditor or an audit firm. § 273 Commercial Code shall apply.

(3) The audited annual financial statements including the statement of costs shall be submitted for approval to the Supervisory Board by the Management Board within five months following the close of the previous business year. The resolution of the Supervisory Board approving the annual financial statements including the statement of costs shall be passed in such timely manner as to enable the Management Board to communicate the annual financial statements including the statement of costs to the Federal Minister of Finance within six months following the close of the previous business year and to publish it pursuant to para 6.

(4) The Supervisory Board shall discharge the members of the Management Board, if the annual financial statements and the statement of costs have been approved, management in the past business year has been performed in a orderly manner, and no violation of duty has occurred in the past business year which would constitute a removal ground pursuant to § 7 para 3 Nos 3 or 5, speaks against a discharge.

(5) The FMA's business year is the calendar year.

(6) The Management Board shall publish the audited annual financial statements approved by the Supervisory Board on the internet homepage of the FMA and arrange for the publication of a reference to the internet address of the FMA in the *Wiener Zeitung* or in another publication medium available in the entire federal territory. The annual financial statements shall be available for inspection on the internet until publication of the next annual financial statements.

### Costs of Supervision

**§ 19.** (1) The FMA shall form a separate accounting unit for each of the supervision areas listed in § 2 paras 1 through 4. In its internal organization it shall make provision for the most far-reaching direct allocation of supervision costs (staff and asset expenses, depreciations and other expenditures) to these accounting units. Costs that cannot be directly allocated to a particular accounting group shall be allocated to the individual accounting groups pursuant to para 2. Those accounting groups are:

1. accounting unit 1 for the costs of banking supervision;
2. accounting unit 2 for the costs of insurance supervision;
3. accounting unit 3 for the costs of securities transactions supervision;
4. accounting unit 4 for the costs of pension funds supervision.

Together with the annual financial statements pursuant to § 18 an accounting group related statement of costs shall be drawn up.

(2) The FMA shall, based on the directly allocated costs calculated for accounting units 1 through 4, calculate the ratios of the costs per accounting unit. Using these ratios, the costs that cannot be allocated to a specific accounting unit pursuant to para 1 shall be allocated to the individual accounting units. The reserve endowment allowed pursuant to § 20 shall count as not directly allocated cost.

(3) The sum of the costs directly allocated to an accounting unit pursuant to para 1 and pro rata pursuant to para 2 shall form the sum total of the accounting unit. The sum of the total costs of the accounting units 1 through 4 forms the total costs of the FMA.

(4) The Federation shall contribute to the FMA a yearly amount of 3,5 million euro. This amount as well as revenues that do not flow to the FMA as refund of supervision costs or respective advance payments or payments under para 10, shall be deducted from the total costs of the FMA. The remaining delta shall be allocated to accounting units 1 through 4 using the ratios pursuant to para 2. The amounts resulting therefrom per accounting unit are, after deducting the authorization costs received pursuant to para 10, the costs to be refunded, after billing by the FMA, by the physical and legal persons subject to the supervision of the FMA pursuant to the provisions of the BWG, VAG, WAG and the PKG.

(5) Die FMA shall, on the basis of each annual financial statement without delay calculate the costs to be borne by the individual entities liable to pay the costs pursuant to para 4 last sentence for the previous business year. The amount so calculated shall be offset with the advance payments received for the preceding business year. The delta resulting therefrom shall be billed for payment, unless there is a credit in favour of the entities liable to pay the costs; credits shall be paid out. For the following business year of the FMA advance payments in the amount of 105% of the amount calculated pursuant to sentence 1 shall be imposed on the entities liable to pay the costs. Based on these billings the entities liable to pay the costs shall pay the amount billed in four equal instalments no later than on the 15th of January, April, July and October of the respective year.

(6) In its cost rulings pursuant to para 5 the FMA shall rule on:

1. the amount of costs from the annual cost statement for the previous business year attributable to the individual entities liable to pay the costs in the respective accounting unit;
2. advance payments made by them for the previous business year;
3. the amount of the negative or positive delta prescribed for payment or authorized to be paid out;

4. the advance payments for the following business year in the amount of 105% of the amount pursuant to No 1.

(7) Die FMA shall set by regulation specific rules on the implementation of the advance payments and the reimbursement of costs, in particular the billing dates and the terms for payment, unless para 5 or § 26 provide otherwise.

(8) For the financial plan pursuant to § 17 an accounting unit related estimate of costs shall be made; paras 1 through 4 shall apply.

(9) In addition to the amount pursuant to para 4 the Federation may, based on the means provided for this purpose in the annual federal budget act, pay an additional cost contribution, if this should be required to cover necessary supervision costs despite economic, cost saving and efficient financial management of the FMA. This amount shall also be deducted from the total costs of the FMA before allocating the costs of the FMA to the accounting units (para 4).

(10) For the authorization of factual situations covered by tariff items 44, 45 and 50 through 59 of the Federal Administration Fees Regulation 1983, BGBl No 24/1983, as amended by BGBl II No 146/2000, instead of federal administration fees, authorization fees pursuant to a regulation on fees to be issued by the FMA shall be paid to the FMA. This shall also apply to the official acts pursuant to the tariff items 1 through 5, to the extent these official acts fall within the sphere of competence of the FMA. The fees may not exceed the costs incurred on average by the authorization or other official acts, taking into account a share of fixed costs. The authorization fees shall be allocated to the respective accounting unit and shall be cost reducing in this accounting unit, taking into account the accounting sub units pursuant to § 7 para 1 WAG.

**§ 20.** (1) The FMA may form a reserve for unexpected burdens pursuant to paras 2 and 3. This reserve shall only be used for the purpose of covering extraordinary supervision expenses.

(2) The endowment of the reserve may take place per business year of the FMA in a maximum amount of 1% of the total costs of the FMA on the basis of the annual financial statements last approved, as long as and to the extent that the reserve has not reached an amount of 5% of the total costs shown in the last annual financial statements, respectively.

(3) The reserve shall be openly shown as reserve in the annual financial statements.

(4) The reserve and its endowment shall be provided for in the financial plan.

### Administrative Assistance

**§ 21.** (1) Within their statutory areas of competencies, all organs of the Federation, the States and the Municipalities are obligated to grant assistance to the FMA. This shall also apply to the Association of Social Security Institutions, to the extent information received from it is necessary for administrative or administrative penalty proceedings to be conducted by the FMA.

(2) The courts, the Federal Minister of Finance within the scope of his responsibilities stated in the federal laws listed in § 2, the Oesterreichische Nationalbank in the context of its competencies under federal laws as well as its responsibilities in the framework of the European System of Central Banks (ESCB), the Take-Over Commission as well as the competent Stock Exchange Company under the Stock Exchange Act shall cooperate with the FMA in a system of mutual assistance.

(3) The FMA shall provide no administrative assistance to organs of the tax administration, in particular pursuant to § 158 Federal Tax Act (*Bundesabgabenordnung* – BAO, BGBl No 194/1961).

(4) Upon request, the organs of the public police shall, within their statutory sphere of competence, provide assistance to the FMA to facilitate its supervisory tasks under § 2, if the measures imposed would otherwise be frustrated.

(5) The Representative of the Federation in Legal Matters may against remuneration represent the FMA upon its request.

(6) With the consent of the FMA, the Oesterreichische Nationalbank may also use audit organs of the FMA for the purpose of conducting audits for which it is responsible under EU law, falling in the area of competence of the European System of Central Banks (ESCB), if the procedure is thereby substantially simplified or expedited or if this should be in the interest of efficiency, simplicity, speed or cost saving.

### Procedural Provisions

**§ 22.** (1) The FMA is competent to enforce the rulings issued by it, with the exception of administrative penalty rulings. The Administrative Enforcement Act 1991 (*Verwaltungsvollstreckungsgesetz* – VVG, BGBl No 53/1991), shall apply, unless para 2 provides otherwise.

(2) No appeal may be lodged against rulings of the FMA, except in administrative penalty proceedings.

(3) Regulations of the FMA shall be published in the Federal Law Gazette (*Bundesgesetzblatt* – BGBl).

(4) The FMA shall permanently keep documents or records of general or fundamental importance. This duty shall apply in any event to rulings it has issued. Other documents and records shall be kept at least seven years; this term starts to run at the end of the calendar year in which

1. in the case of ongoing relationships, the legal relationship has ended;
2. in all other cases, the FMA has last been active in the respective matter.

### Calling on the Supreme Administrative Court

**§ 23.** The FMA my lodge a complaint based on illegality with the Supreme Administrative Court against decisions of the Independent Administrative Panel issued with respect to appeals raised against the FMA's administrative penalty rulings. The term for raising the complaint starts to run upon service of the decision on the FMA.

### Exemption from Fees and Duties

**§ 24.** Die FMA shall be exempt from the stamp and legal fees, the federal administrative duties and the court and court administration fees. For purposes of value added tax and capital gains tax, the FMA shall be treated as a credit institution.

### Transitional Provisions

**§ 25.**

1. (Regarding § 1)
   The FMA shall be deemed to be established when the first Management Board and Supervisory Board have been established. The administrative authority of the FMA starts April 1, 2002. The Federal Minister of Finance shall hand over to the FMA all files relating to the enforcement of the federal laws listed in § 2, to the extent jurisdiction has been transferred by the Federal Minister of Finance to the FMA; to the extent and as long as a transfer has not yet occurred, the Federal Minister of Finance shall ensure that the FMA has access to these files effective April 1, 2002. Leases and service contracts entered into by the Federal Minister of Finance in the area of enforcement of the federal laws listed in § 2 and in force as of March 31, 2002 shall transfer from the Federal Minister of Finance to the FMA.
2. (regarding § 5)
   The Federal Minister of Finance shall without delay take all measures required for the appointment of the first Management Board of the FMA.
3. (regarding § 6)
   The first Management Board shall without delay, however no later than February 28, 2002, adopt Rules of Procedure and submit them to the Supervisory Board for approval. In case of delay by the Management Board the Supervisory Board shall adopt the Rules of Procedure as soon as possible.
4. (regarding § 8)
   The Federal Minister of Finance shall no later than four weeks following the publication of this federal law appoint the members of the first Supervisory Board; the Oesterreichische Nationalbank shall no later than two weeks following publication of this federal law make the nominations pursuant to § 8 para 1.
5. (regarding §§ 10, 14 and 15)
   The Office Committee established on March 31, 2002 at the Federal Ministry of Finance shall serve as works council until a works council has been elected, however no longer than until December 31, 2002. The civil servants assigned to the FMA for permanent service (§ 15 para 1 No 1) shall furthermore continue to be members of the scope of operation of the Central Office Committee at the Federal Ministry of Finance.
6. (regarding § 12)
   The first Supervisory Board shall adopt without delay Rules of Procedure as well as enter into employment contracts with the first Management Board members.

7. (regarding § 17)
   The financial plan for the FMA's business year 2002 shall be drawn up without delay, however no later than by February 28, 2002.

**§ 26.** (Regarding § 19)

(1) The entities liable to pay the costs shall make advance payments for the FMA's business years 2002 and 2003. Liable to pay are those physical and legal persons who as of November 30, 2001 and October 31, 2002 have the license to conduct the banking business, insurance business, investment services business or pension fund business.

(2) The following advance payments are attributed to the individual accounting units:

1. for the FMA's business year 2002:
   a) accounting unit 1: 7.050 million euro,
   b) accounting unit 2: 2.0325 million euro,
   c) accounting unit 3: 2.4150 million euro,
   d) accounting unit 4: 0.2400 million euro;
2. for the FMA's business year 2003:
   a) accounting unit 1: 11.750 million euro,
   b) accounting unit 2: 2.845 million euro,
   c) accounting unit 3: 3.340 million euro,
   d) accounting unit 4: 0.340 million euro.

(3) The allocation of the advance payment amounts attributable to the individual account units to the entities liable to pay the costs shall be effected as follows:

1. for accounting unit 1 pursuant to § 69a BWG;
2. for accounting unit 2 pursuant to § 117 VAG;
3. for accounting unit 3 pursuant to § 7 WAG and the regulation on costs issued by the Austrian Securities Authority; § 7 WAG shall apply with the proviso that 80% shall be borne by the institutions subject to a reporting obligation, 10% by the issuers with the exception of the Federation and 10% by the investment firms;
4. for accounting unit 4 pursuant to § 35 PKG; for purposes of calculating the costs pursuant to § 35 para 1 Nos 2 through 4 PKG, for the advance payments for the business year 2002 the balance sheet date December 31, 2000 shall be governing and for the business year 2003 the balance sheet date December 31, 2001.

The individual amounts so calculated shall be billed for payment to the entities liable to pay the costs pursuant to para 4.

(4) The billing for the business year 2002 shall be effected no later than January 31, 2002, by the Federal Minister of Finance to the entities liable to pay the costs of accounting units 1, 2 und 4 and by the Austrian Securities Authority (BWA) to the entities liable to pay the costs of accounting unit 3; the billing for the business year 2003 shall be effected no later than December 15, 2002 by the FMA.

(5) Payment of the amounts to be prepaid for the business year 2002 shall be effected in three equal installments on April 15, July 15 and October 15, 2002 to the account opened by the Federal Minister of Finance for the FMA at the Oesterreichische Nationalbank and indicated in the ruling.

(6) The Federation shall, of the amount to be paid by it pursuant to § 19 para 4 for the business year 2002, make an advance payment of 750,000 € until October 10, 2001 to the account indicated in para 5; expenses incurred by the FMA in 2001 shall also be borne out of this amount. Payments of the residual amount to be paid by the Federation for the business year 2002 shall be effected starting January 1, 2002.

(7) Die FMA is authorized to continue to avail itself free of costs until December 31, 2002 of the moveable assets of the Federation used until March 31, 2002 for purposes of banking supervision, insurance supervision and pension funds supervision.

(8) Until the enactment of a regulation on fees by the FMA pursuant to § 19 para 10, for the authorization of factual situations covered by tariff items 44, 45 and 50 through 59 of the Federal Administration Fees Regulation 1983, BGBl No 24/1983, as amended by BGBl II No 146/2000, instead of federal administration fees, authorization fees in the amounts stated in tariff items 50 through 59 of the Federal Administration Fees Regulation 1983 shall be paid to the FMA.

(9) In calculating the amounts to be prepaid for the business year 2004 the costs of the FMA in the truncated business year 2002 (April 1 through December 31, 2002) shall be increased by one third.

### References

**§ 27.** In so far as this federal law refers to other federal laws, these shall apply as amended, unless stated otherwise.

### Entry into Force and Enforcement

**§ 28.** (1) The provisions of § 2, § 12, § 13, § 15 para 1 No 1 and paras 2 through 9, § 18, § 19, § 20, § 21, § 22 and § 23 of this federal law including their headings shall enter into force on April 1, 2002.

(2) **(Provision in the rank of constitutional law)** § 1 para 1 as amended by federal law BGBl I No 45/2002 shall enter into force on April 1, 2002.

(3) The repeal of § 3, § 5 para 3, and § 16 as amended by federal law BGBl I No 45/2002, shall enter into forde on April 1, 2002.

(4) § 2 para 1 as amended by federal law BGBl I No 45/2002 shall enter into force on April 2, 2002.

**§ 29.** The following entities are charged with the enforcement of this law:

1. the Federal Government as regards § 5 para 2;
2. the Federal Minister of Finance as regards all other provisions of this federal law.

# Index

(References are to the Austrian Banking Act only)


**A**

acceptance — § 51 para 8; Annex 1 to § 22, No 1 lit a; Annex 1 to § 22, No 2 lit e
account keeping — § 34 para 2 No 1
account statement — § 33 para 9; § 98 para 3 No 7
accounting — §§ 43–65; § 103 Nos 25a, 26–28, 28a, 29, 30, 30a, 30b
accounting field — § 62 No 6
administrative assistance — § 72 para 1; § 77 paras 5 and 6
Administrative Enforcement Act — § 96
administrative offense — § 98 paras 1–4; § 99; § 99b
Administrative Penalties Act — § 98; § 99; § 99b
advertisement — § 35 para 2; § 93 para 9; § 98 para 3 No 11
African Development Bank — Annex 3 to § 22, No 5
ancillary banking services company — § 24 para 3 No 2
annual financial statement — § 23 paras 5 and 6; § 43 paras 1, 2 and 3; § 44; § 59 para 2; § 60 para 1; § 63 paras 2 and 5; § 65 paras 1, 3 and 4; § 93a para 8; § 99 No 13; § 103 No 14
annual interest rate — § 32 para 6; § 33 paras 2, 4, 5, 6 and 10; § 34 para 2 Nos 2 and 4; § 34 para 4; § 35 para 1 No 1 lit c and d; § 35 para 2; § 98 para 3 Nos 1, 2, 6 and 11
annual profit — § 23 para 4 No 3
annual report — § 43 para 1; § 44 para 1; § 60

| | |
|---|---|
| | § 65 paras 1 and 3 |
| | § 83 para 2 |
| annual surplus | § 23 para 7 No 2 |
| | § 51 para 12 |
| articles of association | § 2 No 4 |
| | § 3 para 2 No 1 |
| | § 4 para 3 No 2 |
| | § 5 para 1 Nos 2 and 12 |
| | § 28 para 1 No 3 and 6 |
| | § 28 paras 4 and 5 |
| | § 63 paras 2 and 5 |
| | § 92 para 8 |
| Asian Development Bank | Annex 3 to § 22, No 4 |
| assessment basis | § 22 para 1 No 1 |
| | § 22 para 2 |
| | § 22 para 4 No 6 |
| | § 23 para 6 |
| | § 23 para 14 No 4 |
| | § 24 para 1 |
| | § 103 No 9 lit a |
| | § 103 No 19 |
| | § 103 No 21 lit c |
| assets | § 45 paras 2 and 4 |
| | § 46 paras 1 and 2 |
| | § 48 para 2 |
| | § 50 paras 1 and 4 |
| | § 51 para 13 |
| | § 52 para 1 No 1 |
| | § 52 para 4 No 3 |
| | § 54 para 1 |
| | § 55 para 1 |
| | § 57 para 1 |
| | § 64 para 1 No 8 |
| Assets items/asset items | § 22 |
| | § 23 |
| | § 24 para 2 |
| | § 25 para 10 |
| | § 26 |
| | § 27 |
| | § 45 para 1 Nos 1 and 2 |
| | § 51 paras 1, 2, 3, 4, 5 and 10 |
| | § 52 para 1 No 1 |
| | § 53 paras 1 and 2 |
| | § 54 para 1 |
| | § 55 para 1 |
| | § 64 para 1 Nos 2, 10 and 11 |
| | § 103 No 10 lit c |
| | § 103 No 14 |
| | § 103 No 21 lit b |
| | Annex 1 to § 22, No 1 lit c, e and g |
| Associations Act 1951 | § 95 para 1 |
| Associations Charter 1852 | § 95 paras 1 and 2 |

| | |
|---|---|
| assumption of guarantees | § 3 para 2 No 8 |
| attorney | § 70 paras 2 and 3 |
| audit | § 27 |
| | § 42 paras 1 and 5 |
| | § 43 para 1 |
| | § 62 |
| | § 63 paras 2, 4 and 5 |
| | § 68 para 1 |
| | § 70 para 1 Nos 3 and 4 |
| audit association | § 61 |
| | § 62 Nos 1a, 1b, 2 and 6a |
| audit report | § 44 para 1 |
| | § 63 para 5 |
| | § 70 para 1 Nos 1 and 2 |
| – bank supervision audit report | § 22c para 4 |
| | § 24 para 5 |
| | § 63 para 5 |
| | § 106 No 19 |
| auditing agency | § 61 |
| | § 62 Nos 2 and 7 |
| | § 63 para 1 |
| auditing association | § 61 |
| | § 62 Nos 7 and 10 |
| | § 63 para 3 |
| | § 92 para 7 |
| auditing bodies | § 62 No 7 |
| | § 63 para 1 |
| | § 71 |
| | § 99 No 16 |
| auditor | § 61 |
| | § 62 |
| Austrian Bar Association | § 70 para 3 |
| Austrian Securities Authority | § 38 para 2 No 9 |
| Austrian Stock Exchange | § 25 para 10 |
| authority | § 38 para 1 |
| | § 72 para 1 |
| | § 78 para 7 Nos 1 and 2 |
| – competent authority | § 2 No 9 |
| | § 4 para 5 |
| | § 6 para 4 |
| | § 9 paras 2 and 6 |
| | § 10 paras 3, 4, 5, 7 and 8 |
| | § 11 para 1 No 4 |
| | § 11 paras 3 and 4 |
| | § 13 para 2 No 4 |
| | § 13 para 3 |
| | § 15 paras 1, 2 and 3 |
| | § 16 paras 1 and 2 |
| | § 17 paras 1 and 2 |
| | § 19 |
| | § 20 para 8 |
| | § 22 para 3 No 6 |

– authority pursuant to § 6 Security Police Act — § 41 para 1
authorization — § 2 No 15; § 15 para 4
auxiliary activity — § 1 para 3; § 29 para 1 No 2

**B**

balance — § 25 para 6 Nos 4, 4a and 6; § 27; § 34 para 2 No 2; § 51 para 1; § 64 para 1 No 4; § 87 para 1; § 103 No 21 lit c
balance sheet date — § 58 para 1; § 64 para 1 No 7; § 103 Nos 14 and 16
balance sheet total — § 2 No 25 lit c; § 25 No 13; § 30 para 2 No 3; § 42 para 6; § 76 para 1; § 92 para 1; § 103 No 21 lit c sublit bb
bank — § 94 para 1; § 99 No 15
bank auditor — § 23 para 1 No 2 lit b; § 23 para 7 No 5; § 24 para 5; § 42 para 2 No 2; §§ 60–63a; § 68 para 1; § 70 para 1 Nos 1 and 2; § 70a para 2; § 75 para 3; § 77 para 6; § 99 No 10
bank bond
– funded bank bond — § 1 para 1 No 9; § 27 para 3; § 93 para 2 No 3; § 103 No 10 lit b
banking activity — § 1 para 1; § 4 para 1; § 4 para 4 No 2; § 6 para 4; § 7 para 3; § 8 para 1 No 3; § 28 para 2 No 4; § 78 para 2; § 93 para 2 No 2

| | |
|---|---|
| | § 98 |
| | § 100 |
| | § 103 No 21 |
| banking day | § 37 para 1 No 2 |
| | § 41 para 1 |
| | § 76 paras 6 and 7 |
| | § 78 para 4 |
| banking risks | § 23 para 1 No 3 |
| | § 27 para 1 |
| | § 57 paras 3 and 4 |
| banking secrecy, banking secret | § 38 |
| | § 41 paras 6 and 8 |
| | § 77 para 1 No 1 |
| | § 101 paras 1 |
| banking supervisory authority | § 77 |
| – foreign banking supervisory authority | § 77 |
| banking system | § 5 para 1 No 13 |
| | § 77 para 2 |
| | § 79 para 1 |
| | § 80 para 1 |
| – national economic interest in a functioning | § 9 para 3 No 1 |
| | § 22 para 1 |
| | § 25 para 7 No 3 |
| | § 25 para 14 |
| | § 69 No 4 |
| | § 74 para 5 |
| | § 75 para 4 |
| | § 77 para 2 |
| bankruptcy | § 45 para 4 |
| | § 51 para 9 |
| | § 67 para 2 |
| | § 82 para 3 |
| | § 86 paras 1 and 4 |
| | § 88 |
| Bankruptcy Code | § 67 para 2 |
| | § 78 para 6 |
| | § 82 para 3 |
| | § 86 para 1 |
| | § 90 para 4 |
| | § 93 para 4 |
| bankruptcy proceeding | § 7 para 1 |
| | § 82 para 2 |
| | § 83 para 1 |
| | § 86 para 1 |
| | § 86 para 5 and 6 |
| | § 90 paras 1 and 4 |
| | § 93 para 3 No 1 |
| basis swap | § 22 para 6 No 1 lit a |
| | Annex 2 to § 22, No 1 lit b |

| | |
|---|---|
| Basle Committee on Banking Supervision | § 26 b para 4 |
| bill of exchange | § 1 para 1 No 4 |
| | § 25 para 4 No 5 |
| | § 25 para 10 No 4 |
| | § 51 para 2 |
| | § 86 para 1 |
| | Annex 1 to § 22, No 1 lit b |
| | Annex 1 to § 22, No 4 lit b |
| blank resolutions | § 27 para 6 |
| bond | § 3 para 2 No 5 |
| | § 22 para 3 No 1 lit i |
| | § 23 para 5 |
| | § 23 para 8 Nos 1, 3 and 5 |
| | § 25 para 4 No 3 |
| | § 25 para 10 No 2 |
| | § 27 para 3 |
| | § 50 para 6 |
| | § 51 paras 4, 5, 6, 7 and 8 |
| | § 56 para 1 |
| | § 64 para 1 Nos 7 and 10 |
| | § 93 para 5 No 10 |
| | § 93 a para 3 |
| | § 103 No 10 lit d and e |
| bons de caisse | § 51 para 8 |
| book value | § 22 para 2 No 1 |
| | § 23 para 2 |
| | § 23 para 9 Nos 1, 2 and 3 |
| | § 27 |
| | § 29 paras 1 and 2 |
| | § 50 para 4 |
| | § 58 para 3 |
| branch office | § 2 No 16 |
| | § 4 para 4 |
| | § 5 para 3 |
| | § 6 paras 3 and 4 |
| | § 9 paras 1, 2, 4 and 7 |
| | § 10 paras 1 and 2 |
| | § 10 para 4 No 2 |
| | § 11 para 1 |
| | § 11 para 3 Nos 4 and 6 |
| | § 11 para 5 |
| | § 13 paras 1 and 4 |
| | § 15 para 1 |
| | § 15 para 2 No 1 |
| | § 16 para 1 |
| | § 17 para 1 |
| | § 17 para 2 No 1 |
| | § 21 para 1 No 5 |
| | § 44 paras 3 and 5 |
| | § 63 para 6 |
| | § 73 para 1 No 4 |

§ 93 para 7
§ 94 para 10
§ 103 Nos 7, 8, 21 and 32
building association § 3 para 3 No 3
§ 30 para 1 No 7
business operation § 55 para 2
§ 70 para 2 No 4
§ 73 para 1 No 4
§ 87 para 2
business plan § 4 para 3 No 3
§ 10 para 2 No 2
§ 11 para 3 No 4

**C**

calendar average § 25 para 7
capital § 2 No 3
§ 2 No 23 lit c
§ 20 para 2
§ 21 para 1 No 2
§ 23 para 1 No 1
§ 23 para 3 Nos 1 and 5
§ 23 para 4
§ 23 para 8
§ 23 para 13 Nos 3 and 4
§ 23 para 14 No 5
§ 23 paras 15 and 16
§ 24 para 4
§ 51 paras 10 and 11
§ 64 para 1 No 5 lit c
§ 70 para 2 No 1
§ 73 para 1 No 8
§ 99 No 4
– subordinated capital § 23 para 1 No 6
§ 23 paras 8 and 14
§ 103 No 13
capital consolidation § 24 para 2 No 2
capital contribution § 51 para 10
capital financing business § 1 para 1 No 15
§ 3 para 1 No 6
§ 3 para 2 No 2
capital increase § 92 para 4
§ 102 para 1 No 3
capital investment company § 23 para 9 No 3
§ 25 para 10 No 9 lit e
§ 93 para 5 No 5
capital investment fund § 1 para 1 No 13
§ 23 para 9 No 3
§ 25 para 10 No 9 lit a, b and c
§ 93 para 5 No 5
Capital Market Act § 102 para 5
capital on formation § 23 para 3 No 4
capital reduction § 23 para 4 No 2

| | |
|---|---|
| capital reserve | § 51 para 11 |
| capital structure | § 1 para 2 No 3 |
| Caribbean Development Bank | Annex 3 to § 22, No 8 |
| cash deposit | § 22 para 3 No 1 lit h |
| | § 27 |
| | § 46 para 2 |
| cash in hand | § 22 para 3 No 1 lit a |
| | § 25 para 6 No 1 |
| | § 51 para 1 |
| cash value | § 22 para 3 No 5 |
| | § 27 |
| | § 59 para 6 |
| cashier's hall | § 35 para 1 |
| | § 93 para 9 |
| | § 98 para 3 No 10 |
| central administration | § 93 para 5 |
| central bank | § 22 para 3 No 1 |
| | § 30 para 1 No 7 |
| | § 51 paras 1 and 2 |
| central government | § 22 para 3 |
| | § 27 para 3 No 1 |
| central government items | § 2 No 39 |
| central institution | § 21 para 1 No 2 |
| | § 23 para 13 No 6 |
| | § 25 para 4 Nos 1 and 3 |
| | § 25 para 6 No 6 |
| | § 25 para 7 No 1 |
| | § 25 para 10 No 5 |
| | § 25 para 13 |
| | § 27 |
| | § 92 para 7 |
| | § 103 No 15 |
| certificates of deposit | § 51 para 8 |
| certified public accountant | § 61 |
| | § 62 No 2 |
| Chamber of Auditors | § 70 para 3 |
| chambers | § 22 para 3 No 2 lit e |
| change of reserves | § 23 para 4 No 3 |
| | § 23 para 7 No 2 |
| checking account business | § 1 para 1 No 2 |
| children | § 28 para 1 No 5 |
| Circuit Court of Appeals | § 90 para 5 |
| Civil Code | § 23 para 8 No 3 |
| | § 63 para 4 No 4 |
| | § 67 para 1 |
| | § 99 No 16 |
| | § 103 No 21 lit a sublit bb |
| claims against credit institutions | § 51 para 3 |
| claims against customers | § 51 para 4 |
| clearing house | |
| – recognized | § 2 No 33 |
| clearing member | § 2 No 48 |

| | |
|---|---|
| close links | § 2 No 28 |
| Code of Administrative Procedure | § 8 para 2 No 2 |
| Code of Criminal Procedure | § 41 para 6 |
| collective documents | § 23 para 8 No 3 |
| Commercial Code | § 2 No 1 lit b |
| | § 2 Nos 11 and 12 |
| | § 24 para 2 Nos 1, 2 and 4 |
| | § 24 para 3 No 3 |
| | § 24 para 4 |
| | § 27 para 4 No 1 |
| | § 30 para 3 |
| | § 43 para 3 |
| | § 59 para 3 |
| | § 63 paras 1 and 2 |
| | § 64 paras 1–5 |
| | § 65 paras 2 and 2a |
| | § 103 No 16 |
| commercial name | § 94 para 9 |
| commercial register | § 7 para 1 No 6 |
| | § 84 para 5 |
| | § 90 para 3 |
| | § 92 paras 4 and 10 |
| | § 102 para 3 |
| commission business | § 3 para 2 No 1 |
| commission earnings | § 52 para 3 |
| | § 64 para 1 No 9 |
| commission expenditures | § 52 para 3 |
| commodities contracts | Annex 2 to § 22, No 5 |
| commodities forward transactions | Annex 2 to § 22, No 5 lit a |
| commodities futures | Annex 2 to § 22, No 5 lit b |
| commodities options purchased | Annex 2 to § 22, No 5 lit c |
| components of own funds | § 23 para 1 |
| | § 24 para 1 |
| composition with creditors | § 82 para 1 |
| Composition with Creditors Act | § 93a para 6 |
| consolidated annual report | § 43 para 1 |
| | § 44 para 1 |
| | § 59 para 2 |
| | § 60 |
| | § 65 para 1 |
| consolidated financial statement | § 24 para 3 No 4 |
| | § 43 paras 1 and 2 |
| | § 59 |
| | § 60 |
| | § 63 para 2 |
| | § 65 para 1 |
| consolidated group | § 24 para 1 |
| consolidated own funds | § 24 |
| consolidation | § 23 para 13 Nos 5 and 6 lit b |
| | § 24 para 2 No 3 |
| | § 24 para 3 No 2 |
| | § 24 para 4 |

| | |
|---|---|
| | § 59 para 2 |
| | § 99 No 6 |
| consolidation of capital | § 24 para 2 No 2 |
| constitutional law | § 38 para 5 |
| | § 106 para 1 Nos 2 and 9 |
| | § 107 para 3 |
| consumer | §§ 33–37 |
| | § 34 |
| | § 98 para 3 |
| | § 103 No 22 b |
| consumer credit agreement | § 33 |
| | § 35 para 1 No 1 lit c |
| | § 37 |
| | § 98 para 3 Nos 3, 4 and 5 |
| consumer current account agreement | § 33 para 6 |
| | § 33 para 7 No 2 lit b |
| | § 34 |
| | § 35 para 1 No 1 lit d sublit bb |
| | § 98 para 3 Nos 3 and 8 |
| consumer information | § 103 No 22 b |
| Consumer Protection Act | § 33 para 1 |
| | § 33 para 2 No 4 |
| | § 33 para 10 |
| | § 34 para 1 |
| | § 37 para 1 |
| contingent liabilities | § 27 |
| | § 51 para 13 |
| | § 64 para 1 No 8 |
| contract for novation | § 22 para 6 a |
| | § 22 para 6 d |
| contractual insurance | § 1 para 1 No 18 lit a |
| | § 3 para 3 No 1 |
| | § 29 para 1 No 3 |
| | § 38 para 4 |
| | § 75 paras 1 and 3 |
| contractual netting | § 22 para 6 a |
| control procedure | § 4 para 3 No 3 |
| cooperative | § 23 para 3 No 3 |
| | § 23 para 10 |
| | § 28 para 1 No 2 |
| | § 87 para 1 |
| | § 92 para 8 and 9 |
| cooperative charter | § 2 para 4 |
| cooperative relationship | § 87 para 1 |
| core capital | § 23 para 14 |
| corporate seat | § 26 para 5 |
| | § 30 para 1 |
| | § 65 paras 1 and 3 |
| | § 69 No 3 |
| | § 70 para 3 |
| | § 73 para 2 |

| | |
|---|---|
| | § 78 para 7 |
| | § 94 para 2 |
| Council of Europe Resettlement Fund | Annex 3 to § 22, No 6 |
| counseling | § 1 para 2 No 3 |
| | § 41 para 8 |
| | § 62 Nos 4 and 6 |
| | § 63 para 2 |
| counterparty default | § 22 para 2 No 3 |
| | § 22 para 6 No 1 |
| court commissioner | § 38 para 2 |
| cover assets | § 25 para 5 No 6 |
| | § 25 para 9 No 1 |
| cover fund | §§ 66–68 |
| | § 99 No 16 |
| cover register | § 66 |
| credit business | § 1 para 1 No 3 |
| | § 52 para 3 No 4 |
| credit card | § 1 para 1 No 6 |
| | § 1 para 3 |
| | § 3 para 2 No 8 |
| credit cooperative | § 2 No 1 lit b |
| | § 5 para 1 No 12 |
| | § 93 para 5 No 6 lit a |
| | § 94 para 9 |
| | § 95 para 2 |
| credit facilities | Annex 1 to § 22, No 2 lit e |
| credit insurance | § 1 para 1 No 16 |
| credit risk | § 2 No 57 |
| | § 22 para 4 |
| | § 22 para 6 No 1 |
| | § 51 para 14 |
| | § 53 para 1 |
| | § 103 No 11 |
| credit standing | § 27 para 5 No 1 |
| Credit System Act | § 103 Nos 16, 20 and 21 |
| | § 105 para 2 |
| | § 106 para 1 Nos 1 and 2 |
| creditor protection | § 25 para 7 Nos 1 and 2 |
| | § 77 para 2 |
| | § 92 para 4 |
| Criminal Code | § 39 para 3 |
| | § 40 para 1 No 3 |
| criminal proceedings | § 5 para 1 No 7 |
| | § 38 para 2 No 1 |
| cross currency interest rate swaps | Annex 2 to § 22, No 2 lit a |
| currency | § 22 para 3 No 1 |
| | § 23 para 3 No 6 |
| | § 23 para 11 |
| | § 24 para 2 No 3 |
| | § 26 para 4 |

| | |
|---|---|
| | § 26 a |
| | § 64 para 1 Nos 2 and 5 a |
| currency conversion | § 22 d |
| currency futures | Annex 2 to § 22, No 2 lit c |
| currency options purchased | Annex 2 to § 22, No 2 lit d |
| currency related index contracts | Annex 2 to § 22, No 2 lit c |
| current account credit | § 3 para 2 No 3 |
| | § 33 para 3 |
| | § 98 para 3 No 5 |
| custody business | § 1 para 1 No 5 |
| | **D** |
| danger | § 15 para 3 |
| | § 78 paras 1 and 4 |
| data processing | § 77 |
| Data Protection Act | § 77 para 4 |
| | § 79 para 2 |
| data storage devices | § 44 para 1 |
| | § 70 para 1 No 1 |
| | § 71 paras 2 and 4 |
| | § 76 para 7 |
| debt instruments | § 2 No 40 |
| – long position in | § 2 No 50 |
| – short position in | § 2 No 51 |
| deferred items | § 22 para 3 No 1 lit k |
| | § 22 para 3 No 3 lit b |
| definitions | § 2 |
| delta | § 2 No 49 |
| demand money | § 25 para 4 No 3 |
| deposit | § 2 No 20 lit c |
| | § 2 No 21 |
| | § 22 para 3 No 2 lit g sublit ee |
| | § 23 para 8 Nos 3 and 5 |
| | § 25 para 4 Nos 1 and 2 |
| | § 25 para 7 No 1 |
| | § 25 para 8 No 3 |
| | § 25 para 11 No 7 |
| | § 25 para 13 |
| | § 32 para 9 |
| | § 95 paras 3 and 4 |
| | § 103 No 21 lit a |
| | § 103 Nos 32 and 32 a |
| – dedicated deposit | § 27 |
| – demand deposit | § 25 para 4 No 1 |
| | § 25 para 13 |
| – deposit to be secured | § 3 para 2 No 9 |
| | § 93 para 2 |
| – subordinated deposit | § 23 para 8 No 3 |
| deposit business | § 1 para 1 No 1 |
| | § 93 para 1 |
| | § 95 para 4 |

| | |
|---|---|
| deposit certificates | § 22 para 3 No 1 lit h<br>§ 22 para 3 No 2 lit g sublit ff<br>§ 25 para 13<br>§ 27 |
| deposit guarantee | § 77 para 4<br>§ 93 |
| deposit guarantee facility | § 4 para 6<br>§ 38 para 4<br>§ 61<br>§ 73 para 1 No 10<br>§ 75 para 3<br>§ 92 para 7<br>§ 93<br>§ 93 a<br>§ 99 Nos 13 and 14<br>§ 103 No 32 |
| deposit guarantee scheme | § 10 para 4 No 2<br>§ 35 para 1 No 3<br>§ 93 para 11<br>§ 98 para 2 No 10 |
| Deposits Act | § 40 para 1 No 1<br>§ 69<br>§ 70 para 4 |
| derivative instruments | § 1 para 1 No 7 |
| development company | § 3 para 1 No 6 |
| differential amount | § 23 para 9 No 2<br>§ 24 para 2 Nos 2 and 4<br>§ 50 para 4<br>§ 52 para 1 Nos 1 and 2<br>§ 56 paras 2, 3, 4 and 5<br>§ 103 No 16 |
| Directives | |
| – 77/780/EEC | § 2 Nos 6, 7 and 15<br>§ 9 para 1<br>§ 11 para 1 No 1<br>§ 11 para 2 No 1<br>§ 13 para 2 No 3<br>§ 15 para 5<br>§ 30 para 1 No 7<br>§ 30 para 2 No 2<br>§ 77 para 5<br>§ 77 a para 2 |
| – 85/611/EEC | § 23 para 9 No 3<br>§ 93 para 5 No 5 |
| – 88/220/EEC | § 23 para 9 No 3 |
| – 89/646/EEC | § 2 Nos 24 and 25<br>§ 8 paras 2, 3 and 5<br>§ 9 paras 1 and 6<br>§ 10 para 6<br>§ 11 para 1 No 5<br>§ 11 para 4<br>§ 13 para 1 |

§ 15 para 5
§ 77 para 5
§ 77 a para 2
§ 98 para 2 No 2
§ 103 No 8
– 89/647/EEC § 22 para 9 No 1
– 92/30/EEC § 11 para 1 No 5
§ 77 para 5
§ 77 a para 2
§ 77 a para 4
– 92/121/EEC § 27 para 3 No 1
§ 27 para 10 No 1
– 93/22/EEC § 2 No 7 lit b
§ 2 No 29
§ 2 No 31 lit a
§ 8
§ 9 a para 1
§ 22 c para 4
– 94/19/EC § 93 para 3 No 4
§ 93 paras 7 and 10
§ 93 a para 9
– 95/26/EC § 77 a para 2
– 00/12/EC § 69
§ 75 para 5
discount business § 1 para 1 No 4
disincorporation § 92 para 8
dividend coupon § 25 para 10 No 3
dividends § 23 para 1 No 5
§ 23 para 3 No 8
§ 73 para 1 No 8
duty of diligence § 36
§ 39
§ 98 para 3 No 12
duty to consolidate § 30 paras 5 and 6
duty-free zone § 43 para 3

**E**

e-money business § 1 para 1 No 20
early warning system § 61
§ 93 a para 7
EC directives
– in general § 2 No 20
– specific **see** Directives
economic unit § 27
§ 75 para 1 No 3
§ 75 para 3
ECU § 93 para 5 No 11
employee savings bank § 95
endorsement obligations Annex 1 to § 22, No 1 lit b
endowment capital § 23 para 3 No 6
endowment deposit § 103 No 19
§ 103 No 21 lit a sublit bb

| | |
|---|---|
| equities | § 2 No 41 |
| equity valuation | § 24 para 2 No 4 |
| EU law provisions | § 99 No 17 |
| Euro balances | § 25 para 6 No 6 |
| Euro deposit | § 25 para 13 |
| Euro issuing | § 25 para 8 |
| Euro liabilities | § 25 paras 4, 5, 8 and 9 |
| Euromarket | § 51 para 5 |
| European Bank for Reconstruction and Development | Annex 3 to § 22, No 9 |
| European Commission | § 8 paras 1, 2, 5 and 6<br>§ 10 para 8<br>§ 15 paras 2 and 3<br>§ 17 para 2<br>§ 22 para 3 Nos 1 lit b and 2 lit g<br>§ 22 paras 9<br>§ 22 para 10 No 5<br>§ 27 para 3 No 1 |
| European Communities | § 22 para 3 No 1 lit c and g<br>§ 27 para 3 No 1 |
| European Counsel | § 8 paras 3 and 6 |
| European Central Bank | § 25 paras 5, 6, 9 and 11 |
| European Currency Union | § 103 No 18 |
| European Economic Area | § 2 Nos 5 and 8<br>§ 65 para 4<br>§ 107 para 2 |
| European Investment Bank | § 22 para 3 No 2 lit a |
| European Investment Fund | Annex 3 to § 22, No 10 |
| European System of Central Banks | § 25 para 10 |
| European Union | § 1 para 4<br>§ 2 No 5<br>§ 22 para 10<br>§ 107 para 5 |
| exchange | |
| – recognized | § 2 No 32 |
| exchange bureau business | § 1 para 2 No 2<br>§ 94 para 1 |
| exchange rate contract | § 22 para 5 |
| exchange rate instrument | § 1 para 1 No 7 |
| exchange rate risk | § 26 para 3<br>§ 26a para 4<br>§ 30 para 10 No 10 |
| exchange rate transaction | § 27 |
| exchange trading | § 51 para 5<br>§ 64 para 1 Nos 10 and 11 |
| expert | § 63 para 2<br>§ 70 Abs 1 No 1<br>§ 70a para 2<br>§ 77 para 6<br>§ 83 para 3<br>§ 86 para 2 |
| expert opinion | § 79 para 1 |

| | |
|---|---|
| export business | § 3 para 2 No 1 |
| Export Financing Promotion Act | § 3 para 1 No 7 |
| export promotion | § 3 para 1 No 7 |
| Export Promotion Act | § 3 para 1 No 4 |
| | § 3 para 1 No 7 |
| | § 25 para 5 No 2 |
| | § 25 para 9 No 3 |
| | **F** |
| factoring business | § 1 para 1 No 16 |
| | § 3 para 2 No 7 |
| Federal Accounting Company with limited liability | § 72 paras 2 and 3 |
| Federal Government | § 78 |
| | § 108 No 1 |
| Federal Minister of Economic Affairs | § 1 para 4 |
| | § 108 No 5 |
| Federal Minister of Finance | § 1 para 4 |
| | § 22 para 10 |
| | § 25 para 10 No 8 |
| | § 27 para 10 |
| | § 65 para 4 |
| | § 68 para 2 |
| | § 72 paras 1 and 3 |
| | § 77 para 1 |
| | § 77 a |
| | § 93 a paras 3 |
| | § 108 Nos 5 and 6 |
| Federal Minister of Internal Affairs | § 108 No 3 |
| Federal Minister of Justice | § 68 para 2 |
| | § 90 para 2 |
| | § 108 Nos 2 and 4 |
| Federal Tax Act | § 77 para 1 No 1 |
| federal treasury bills | § 25 para 10 No 8 |
| | § 51 para 2 |
| Federation | § 3 para 2 No 1 |
| | § 22 para 3 No 1 lit b, d and g |
| | § 22 para 3 No 2 lit m |
| | § 26 para 3 |
| | § 26 a para 4 |
| | § 27 para 3 Nos 1 and 4 a |
| | § 75 para 2 |
| | § 83 para 1 |
| | § 93 a para 3 |
| | § 97 para 2 |
| | § 103 c No 8 |
| fees | § 52 para 1 No 4 |
| final provisions | §§ 103 – 108 |
| financial assets | § 52 para 4 No 1 |
| | § 53 para 2 |
| | § 54 para 1 |

| | |
|---|---|
| | § 55 para 2 |
| | § 56 paras 1, 4 and 5 |
| financial futures | § 1 para 1 No 7 lit c |
| financial holding | § 94 para 3 |
| | § 99 No 15 |
| financial holding company | § 2 No 25 |
| | § 30 paras 1, 2 and 4 |
| | § 73 para 3 |
| | § 77a para 3 |
| | § 94 para 4 |
| | § 99 No 6 |
| | § 99a para 1 |
| financial institution | § 1 para 2 |
| | § 2 No 14 |
| | § 2 No 24 |
| | § 11 |
| | § 13 |
| | § 40 |
| | § 94 para 10 |
| | § 99 No 15 |
| | § 103 No 4 |
| financial instruments | § 2 No 34 |
| financial market | § 22 para 10 No 4 |
| Financial Market Authority (FMA) | § 4 paras 1 and 6 |
| | § 5 para 3 |
| | § 6 |
| | § 8 para 1 |
| | § 10 paras 4 and 8 |
| | § 15 paras 2 and 5 |
| | § 17 paras 1, 2 and 4 |
| | § 20 |
| | § 22 para 3 Nos 1, 2, 6 and 7 |
| | § 22 para 9 No 2 |
| | § 25 para 10 No 9 |
| | § 26b para 7 |
| | § 27 para 3 No 1 |
| | § 41 para 5 |
| | § 42 para 4 |
| | § 44 paras 1, 2, 3, 4 and 5 |
| | § 63 |
| | § 70 para 5 |
| | § 73 |
| | § 77 paras 1 and 4 |
| | § 79 paras 2 and 3 |
| | § 80 para 1 |
| | § 93a para 8 Nos 1 and 2 |
| | § 97 para 1 |
| | § 99a para 1 |
| – duties in receivership and bankruptcy proceedings | §§ 82–91 |
| – regulations by | § 22 para 3 Nos 6 and 7 |
| | § 22 para 10 |

| | |
|---|---|
| | § 25 para 7 Nos 1 and 2 |
| | § 25 paras 12 and 14 |
| | § 26 para 3 No 5 |
| | § 27 para 10 |
| | § 41 para 8 |
| | § 43 para 2 |
| | § 74 para 5 |
| – supervision | §§ 69–77a |
| – supervision in the Context of Freedom of Establishment and Freedom to Provide Services | §§ 15–18 |
| financial reconstruction | § 29 para 3 No 1 |
| financial situation | § 10 para 3 |
| financial transactions | § 52 para 4 |
| | § 64 para 1 No 9 |
| – special off-balance sheet financial transactions | § 22 para 3 No 8 |
| | § 22 paras 5, 7 and 8 |
| | § 22 para 10 No 5 |
| | Annex 2 to § 22 |
| Fiscal Penalties Act | § 41 para 6 |
| fixed assets | § 23 para 9 No 2 |
| | § 44 para 4 |
| | § 55 para 1 |
| | § 56 para 1 |
| | § 57 para 1 |
| | § 58 para 6 |
| | § 64 para 1 No 11 |
| foreign currency | § 22 para 3 No 1 |
| foreign currency business | § 1 para 1 No 7 lit b |
| Foreign Exchange Act | § 79 para 3 No 3 |
| | § 99 No 17 |
| foreign exchange business | § 1 para 1 Nos 7 lit b and 18 lit c |
| | § 52 para 4 No 2 |
| foreign exchange contracts | § 22 paras 6c No 4 |
| | Annex 2 to § 22, No 2 |
| foreign exchange forward transactions | § 26 para 6 Nos 1 lit c and 2 lit c |
| | § 50 para 6 |
| | Annex 2 to § 22, No 2 lit b |
| foreign exchange market | § 26 para 9 |
| foreign exchange positions | § 30 para 10 No 9 |
| foreign exchange provisions | § 1 para 3 |
| forms | § 43 para 2 |
| forward deposits | § 25 para 4 No 3 |
| | § 25 para 8 No 2 |
| | § 25 para 10 No 5 |
| forward forward deposits | Annex 1 to § 22, No 1 lit f |
| | Annex 2 to § 22, No 1 lit c |
| forward rate agreements | Annex 2 to § 22, No 1 lit c |
| forward transactions | § 22 para 4 |
| | § 52 para 1 No 3 |

| | |
|---|---|
| | § 58 paras 2 and 3 |
| | § 64 para 1 No 3 |
| | Annex 2 to § 22, No 4 lit a |
| free deliveries | § 22b para 1 No 9 |
| | § 22 para 2 No 35 lit d |
| | § 22m |
| freedom of establishment | §§ 9–19 |
| | § 69 Nos 2 and 4 |
| | § 103 No 9 lit a sublit cc |
| freedom to provide services | §§ 9–19 |
| | § 69 Nos 2 and 4 |
| | § 103 No 9 lit a sublit cc |
| full consolidation | § 23 para 13 No 5 |
| | § 24 para 1 |
| fund for general banking risks | § 23 para 1 No 3 |
| | § 57 paras 3 and 4 |
| Fund for the Promotion of Scientific Research | § 3 para 1 No 8 |
| fund property | § 22 para 3 No 4 |
| fund provisions | § 22 para 3 No 4 |
| | § 23 para 9 No 3 lit b |
| | **G** |
| General Arrangements to Borrow | § 2 No 18 |
| general business terms and conditions | § 35 para 1 No 2 |
| general partnership | § 21 para 1 No 3 |
| global certificate | § 23 para 8 No 3 |
| government commissioner | § 70 para 2 No 2 |
| | § 70 paras 3 and 6 |
| grandchild company | § 13 para 1 |
| | § 13 para 2 Nos 2, 4 and 5 |
| group | § 4 para 3 No 5 |
| | § 8 para 1 No 1 |
| | § 22 |
| | § 27 |
| group of connected clients | § 27 paras 2 and 2b |
| | § 27 para 3 lit h |
| | § 27 paras 4, 4a, 8 and 10 |
| | § 75 para 1 No 3 |
| | § 75 para 3 |
| group of credit institutions | § 22 para 1 |
| | § 24 paras 1 and 4 |
| | § 29 paras 1 and 2 |
| | § 30 |
| | § 42 para 7 |
| | § 59 para 1 |
| | § 60 |
| | § 64 para 4 |
| | § 70 para 1 |
| | § 103 No 9 lit a sublit bb and cc |

§ 103 No 18a
§ 103 No 21 lit a sublit bb
guarantee business § 1 para 1 No 8
§ 3 para 2 No 2
guarantees § 1 para 1 No 8
§ 100 para 1
Annex 1 to § 22, No 1 lit c
Annex 1 to § 22, No 2 lit b and e
Annex 1 to § 22, No 4 lit a

**H**

head office § 73 para 1 No 4
§ 103 No 21 lit a sublit bb
holding relationship § 45 para 1 Nos 2 and 4
home Member State § 2 No 6
§ 9 paras 2 and 6
§ 11 para 1 No 4
§ 11 paras 3 and 4
§ 13 para 2 No 4
§ 13 para 3
§ 15 paras 1, 2 and 3
§ 17 paras 1 and 2
host Member State § 2 No 7
§ 10 para 2 No 3
§ 10 paras 3, 4, 5, 7 and 8
§ 16 para 1
§ 19
housing construction loan § 1 para 1 No 12
housing construction savings and loan association § 1 para 1 No 12
§ 43 para 2
§ 94 paras 5 and 9
§ 95 para 4
§ 99 No 15
§ 103 Nos 9 lit d
§ 103 para 12
Housing Construction Savings and Loan Associations Act § 1 para 1 No 12
§ 69
§ 70 para 4
housing construction savings and loan business § 1 para 1 No 12
§ 25 para 13
§ 94 para 5
§ 95 para 4
housing construction savings and loan contract § 1 para 3
housing construction savings deposit § 1 para 1 No 12
§ 25 para 5 No 5
§ 25 para 9 No 6
§ 94 para 5 No 2

## I


| | |
|---|---|
| industrial strategy | § 1 para 2 No 3 |
| Inheritance and Gift Tax Act | § 38 para 2 No 8 |
| initial capital | § 2 No 10 |
| | § 3 para 4 |
| | § 4 para 3 No 4 |
| | § 5 para 1 No 5 |
| | § 22 para 1 |
| initial endowment | § 4 para 4 No 3 |
| | § 5 para 1 No 5 |
| | § 22 para 1 |
| | § 23 para 3 No 6 |
| initiation of bankruptcy proceedings | § 83 para 1 |
| insolvency provisions | § 73 para 1 No 6 |
| | §§ 82–91 |
| insurance company | **see** contractual insurance company |
| insurance contracts | § 1 para 3 |
| | § 52 para 3 No 4 |
| Inter-American Development Bank | Annex 3 to § 22, No 3 |
| Inter-American Investment Corporation | Annex 3 to § 22, No 11 |
| interbank market | § 1 para 1 No 17 |
| | § 22 para 3 No 6 |
| | § 51 para 5 |
| interbank market interest rate | § 51 para 5 |
| interbanking dealings | § 3 para 2 No 9 |
| interest | § 23 para 7 No 2 |
| | § 26 paras 3 and 5 |
| | § 32 paras 7 and 9 |
| | § 33 para 8 |
| | § 52 para 1 |
| | § 64 para 3 |
| | § 86 para 1 |
| | § 97 paras 1 and 2 |
| | § 100 para 1 |
| interest adjustment clause | § 33 para 2 No 4 |
| interest adjustment possibility | § 25 para 1 |
| interest coupons | § 25 para 10 No 3 |
| interest earnings | § 64 para 1 No 9 |
| interest rate | § 25 para 2 |
| interest rate contract | § 22 para 6 Nos 1 and 2 |
| interest rate futures | Annex 2 to § 22, No 1 lit d |
| interest rate instrument | § 1 para 1 No 7 lit d |
| interest rate options purchased | Annex 2 to § 22, No 1 lit e |
| interest rate swaps | § 22 para 6 No 1 |
| | Annex 2 to § 22, No 1 lit a and b |
| | Annex 2 to § 22, No 2 lit a |
| interim financial statement | § 70 para 1 No 1 |
| interim position | § 93 para 2 No 2 |
| interim profit | § 23 para 1 No 2 |
| internal audit | § 27 para 9 |
| | § 42 |

| | |
|---|---|
| | § 73 para 1 No 11 |
| | § 77 para 4 No 2 |
| | § 77 para 6 |
| international agreements | § 77 para 3 |
| international cooperation | § 77 |
| international sanctions | § 78 |
| International Bank for Reconstruction and Development | Annex 3 to § 22, No 1 |
| International Finance Corporation | Annex 3 to § 22, No 2 |
| International Monetary Fund | § 2 No 18 |
| investment business | § 1 para 1 No 13 |
| | § 3 para 2 No 4 |
| | § 3 para 4 |
| investment certificate | § 23 para 9 No 3 |
| investment firm | § 2 No 30 |
| – recognized investment firm | § 2 No 31 |
| investment funds | § 1 para 1 No 13 |
| investment fund certificate | § 1 para 3 |
| | § 22 para 3 No 4 |
| | § 52 para 2 |
| Investment Funds Act | § 1 para 1 No 13 |
| | § 25 para 10 No 9 |
| | § 69 |
| | § 70 para 4 |
| investment management | § 92 para 8 |
| | § 107 para 6 |
| investment service | § 2 No 29 |
| issuing of securities business | § 1 para 1 Nos 9 and 10 |

**J**

| | |
|---|---|
| joint ownership shares | § 25 para 10 No 9 |
| joint sureties | § 103 No 11 |

**L**

| | |
|---|---|
| large exposures | § 11 para 1 No 5 |
| | § 13 para 2 No 5 |
| | § 27 |
| | § 74 para 4 No 1 |
| | § 97 para 1 No 6 |
| | § 103 No 21 |
| layout | |
| – for balance sheets and the profit and loss accounts | § 43 para 2 |
| – for reports to be drawn up by the credit institutions | § 68 para 2 lit b |
| | § 70 para 1 No 1 |
| | § 74 paras 1, 2 and 5 |
| | § 75 para 4 |
| leasing business | § 1 para 2 No 1 |
| | § 22 para 3 No 5 |
| | § 64 para 1 No 1 |

| | |
|---|---|
| – real estate leasing business | § 103 No 10 lit c |
| leasing claim | § 22 para 3 No 5 |
| | § 59 para 6 |
| leasing company | § 59 para 6 |
| leasing contract | § 1 para 2 No 1 |
| legal rulings | § 5 paras 2 and 3 |
| | § 70 para 2 |
| | § 96 |
| Legal Representative of the Federation in Financial Matters | § 6 para 5 |
| | § 82 paras 2 and 3 |
| | § 83 para 1 |
| lessee | § 22 para 3 No 5 |
| | § 27 para 3 No 1 lit k |
| | § 103 No 10 lit a sublit bb |
| letter of credit | § 51 para 13 |
| letter of support | § 103 No 21 lit c |
| liability | § 47 para 2 |
| | § 51 para 13 |
| | § 62 No 2 |
| liability claims | § 41 para 7 |
| liability reserve | § 23 para 1 No 2 |
| | § 23 para 6 |
| | § 103 No 12 |
| liability sum | § 23 para 10 |
| | Annex 1 to § 22, No 3 lit b |
| liability sum surcharge | § 23 para 1 No 8 |
| | § 23 para 10 |
| | § 23 para 14 No 6 |
| license | § 1 para 3 |
| | § 3 para 1 No 4 |
| | § 3 para 2 |
| | § 4 |
| | § 5 |
| | § 6 |
| | § 7 |
| | § 8 para 1 Nos 1 and 4 |
| | § 8 para 3 |
| | § 8 para 5 Nos 2 and 3 |
| | § 10 para 1 |
| | § 16 para 2 |
| | § 27 |
| | § 70 para 4 No 3 |
| | § 92 para 6 |
| | § 93 para 1 |
| | § 98 |
| | § 100 |
| | § 103 Nos 5 and 6 |
| limited partnership | § 21 para 1 No 3 |
| | § 93 para 4 |
| line of credit | § 75 para 1 Nos 1 and 2 |

| | |
|---|---|
| | § 75 paras 2 and 3 |
| | Annex 1 to § 22, Nos 2 lit e and 4 lit a |
| liquid resources of the first degree | § 25 paras 3, 4, 6 and 7 |
| liquid resources of the second degree | § 25 paras 3, 8, 10 and 12 |
| liquidation | § 6 paras 4 and 5 |
| | § 7 para 1 No 4 |
| | § 23 para 7 No 3 |
| | § 45 para 4 |
| | § 48 para 1 |
| | § 51 para 9 |
| liquidation proceeds | § 23 para 4 No 5 |
| liquidators | § 6 para 5 |
| liquidity | § 25 |
| | § 103 No 17 |
| liquidity plan | § 25 para 1 |
| liquidity requirement | § 25 para 7 No 1 |
| liquidity reserve | § 22 para 3 No 1 lit i |
| | § 25 para 13 |
| liquidity risk | § 30 para 10 |
| listed price | § 23 para 9 No 2 |
| loan, credit | § 33 paras 1 and 3 |
| | § 33 para 8 Nos 1 and 2 |
| | § 33 para 10 |
| | § 75 para 1 Nos 1 and 2 |
| | § 75 paras 2 and 3 |
| | § 103 No 23 |
| | Annex 1 to § 22, No 1 lit c |

**M**

| | |
|---|---|
| management risk | § 22 para 3 No 1 lit i |
| | § 27 para 3 No 1 lit l |
| | § 27 para 8 |
| manager | § 2 No 1 |
| | § 4 paras 3 and 4 |
| | § 5 para 1 |
| | §§ 6–13 |
| | § 15 para 2 No 1 |
| | § 17 para 2 No 1 |
| | § 20 para 6 No 2 |
| | § 23 para 5 |
| | § 27 para 8 |
| | § 28 paras 1, 3 and 5 |
| | § 39 para 1 |
| | § 42 paras 1 and 3 |
| | § 43 para 1 |
| | § 63 paras 3 and 5 |
| | § 70 para 2 No 3 |
| | § 70 para 4 No 2 |
| | § 71 para 3 Nos 1 and 2 |
| | § 73 para 1 Nos 2, 3 and 5 |
| | § 99 No 10 |
| | § 103 No 6 |

| | |
|---|---|
| managing board | § 2 No 1 lit b<br>§ 28 para 1 No 2<br>§ 102 para 2 |
| margin requirements | § 22 para 5 |
| market | § 22 para 6 No 1<br>§ 64 para 1 No 9 |
| market conditions | § 25 para 1 |
| market value | § 22 para 6 No 1<br>§ 56 paras 4 and 5 |
| marking to market approach | § 22 paras 5 and 6 |
| maturity | |
| – original maturity | § 22 para 3 No 2 lit a and k<br>§ 22 para 5 No 6 lit b<br>§ 22 para 6 No 2<br>§ 23 para 7<br>§ 103 Nos 17 and 31<br>Annex 1 to § 22, Nos 2 lit e and 4 lit a |
| – residual maturity | § 22 para 6<br>§ 23 para 7 No 5<br>§ 25 para 3<br>§ 56 para 3<br>§ 64 para 1 No 4<br>§ 74 para 4 No 3 |
| maturity computation | § 22 para 6 No 2 |
| means of payment | § 1 para 1 No 6<br>§ 1 para 1 No 7 lit a<br>§ 1 para 2 No 2<br>§ 22 para 3 No 1 lit a |
| merger | § 7 para 1 No 6<br>§ 92 para 5<br>§ 103 No 9 lit c |
| minimum reserve obligation | § 97 para 1 No 2 |
| mixed-activity company | § 2 No 26<br>§ 70a para 1 |
| monetary fine | § 96 |
| money brokering transaction | § 1 para 1 No 17 |
| money laundering | § 39 para 3<br>§ 40<br>§ 41<br>§ 93 para 5 No 3 |
| money laundering advisory agency | § 41 para 8 |
| money loan contract | § 1 para 1 No 3 |
| money market business | § 3 para 2 No 1 |
| money market certificates | § 25 para 4 No 3 |
| money market instrument | § 1 para 1 No 7 lit b |
| money market paper | Annex 1 to § 22, No 2 lit d |
| monthly report | § 22 para 6 No 2<br>§ 23 para 13 No 6 lit a<br>§ 25 para 2<br>§ 74 paras 1, 3, 4 and 5 |
| moratorium | § 78 |

| | |
|---|---|
| mortgage | § 22 para 3 No 3 lit a |
| | § 27 para 3 No 1 lit k |
| Mortgage Banks Act | § 23 para 9 No 1 |
| | § 33 para 8 No 1 |
| | § 69 |
| | § 70 para 4 |
| | § 103 No 10 lit a and b |
| | § 103 No 21 lit g |
| mortgage bond | § 1 para 1 No 9 |
| | § 69 |
| | § 70 para 4 |
| | § 103 No 10 lit a and b |
| Mortgage Bond Division of the Austrian State Mortgage Banks | § 23 para 3 No 5 |
| | § 23 para 5 |
| | § 92 para 9 |
| | § 94 para 7 |
| Mortgage Bonds Act | § 70 para 4 |
| | § 103 No 10 lit a and b |
| mortgage loan | § 1 para 1 No 18 |
| municipal bond | § 1 para 1 No 9 |
| | § 27 para 3 No 1 |
| | § 93 para 2 No 3 |
| | § 103 No 10 lit a and b |
| | § 103 No 11 c |
| | § 103 No 21 lit g |
| municipality | § 22 para 3 No 2 lit c and d |
| | § 22 para 9 |
| | § 27 para 3 No 1 |

**N**

| | |
|---|---|
| national economic interest | § 22 para 3 No 7 |
| | § 25 para 7 No 3 |
| | § 25 para 14 |
| | § 69 |
| | § 74 para 5 |
| | § 75 para 4 |
| | § 77 para 2 |
| net loss | § 23 para 7 No 3 |
| nominal capital | § 2 No 2 |
| | § 23 para 3 No 2 |
| | § 62 No 3 |
| non-bank | § 2 No 22 |
| | § 51 para 4 |
| | § 57 para 1 |
| | § 64 para 1 No 4 |
| non-contentious proceedings | § 6 para 5 |
| | § 20 para 6 No 3 |
| Nordic Investment Bank | Annex 3 to § 22, No 7 |
| notes on the accounts | § 23 para 15 |
| | § 45 para 3 |
| | § 48 para 1 |

| | |
|---|---|
| | § 50 para 4 |
| | § 51 paras 13 and 14 |
| | § 56 paras 3, 4 and 5 |
| | § 60 |
| | § 64 |
| | § 65 para 2 |
| | § 83 para 2 |
| notice board of the court | § 85 |

**O**

| | |
|---|---|
| obligation to make additional contributions | § 23 para 10 |
| OECD | § 2 No 18 |
| Oesterreichische Kontrollbank AG | § 3 para 1 No 7 |
| Oesterreichische Nationalbank | § 3 para 1 No 1 |
| | § 4 para 6 |
| | § 5 para 2 |
| | § 21 para 3 |
| | § 22 para 6b No 3 |
| | § 22 para 6c |
| | § 22b para 4 |
| | § 25 |
| | § 26b paras 3, 4, 5, 6 and 7 |
| | § 38 para 1 |
| | § 41 para 5 |
| | § 42 para 4 |
| | § 44 |
| | § 63 para 3 |
| | § 70 para 1 No 3 |
| | § 70a para 2 |
| | § 72 para 1 |
| | § 74 para 3 |
| | § 75 paras 1, 3, 5 and 6 |
| | § 77 para 6 |
| | §§ 79–80 |
| | § 82 para 6 |
| | § 93a para 8 No 1 |
| | § 98 para 2 No 8 |
| | § 99 para 10 |
| | § 103 No 21 |
| | Annex 1 to § 22, No 4 lit b |
| Oesterreichische Nationalbank Act | § 79 para 3 No 2 |
| official broker | § 3 para 1 No 5 |
| Official Gazette attached to the *Wiener Zeitung* | § 25 para 10 No 9 lit c and e |
| | § 65 paras 1 and 3 |
| | § 78 para 4 |
| official language of a Member State | § 19 |
| official secrecy | § 77 para 7 |
| open position | § 26 |
| | § 74 para 4 No 2 |
| | § 103 Nos 18–20 |

option rights § 22 para 3 No 8
options § 1 para 1 No 7 lit c
§ 22 para 3 No 8
options business § 1 para 1 No 7 lit c
organ § 28 para 3
§ 38 para 1
§ 70 para 1 No 1
§ 70 para 2 No 3
§ 76 paras 4, 5 and 7
§ 84 para 2
§ 92 para 8
original exposure approach § 22 para 5
§ 22 para 6
over-the-counter derivative instruments § 2 No 36
§ 22 o
over-the-counter purchase § 1 para 2 No 2
over-the-counter sale § 1 para 2 No 2
own funds § 11 para 3 No 2
§ 22 paras 2 and 3
§ 23
§ 24
§ 26 paras 1 and 2
§ 27 paras 5, 7 and 8
§ 29 para 1 No 3
§ 29 paras 2 and 4
§ 97 para 1 No 1
§ 103 No 9 lit a, b and c
§ 103 Nos 12–15 and 22
own funds quality § 23 para 7 No 5
§ 23 para 8 No 1
owner § 20 para 6
§ 28 para 3
§ 51 paras 10 and 11
§ 103 No 10 lit c
Österreichische Postsparkasse § 23 para 5
§ 31 para 2
§ 94 para 2

**P**

parent company § 2 Nos 11, 26 and 28 lit b
§ 8 para 5
§ 11 para 1 Nos 1, 3, 4 and 5
§ 11 para 2 No 1
§ 20 para 8 No 3
§ 27 para 3 No 1 lit f and g
§ 27 para 7
§ 70 a paras 1 and 7
§ 103 Nos 11 and 28
participation § 2 No 2
§ 2 No 23 lit d
§ 2 No 24 lit b

§ 8 para 1 No 2
§ 8 para 4 No 3
§ 8 para 5 No 2
§ 23 para 4 No 5
§ 23 para 15
§ 24 para 2 No 2
§ 24 para 3 Nos 2 and 3
§ 29
§ 30 paras 3, 7 and 8
§ 52 para 2
§ 54 para 1
§ 55 para 2
§ 59 para 2
§ 64 para 1 Nos 9 and 10
§ 103 Nos 16 and 22

– qualifying participation
§ 2 No 3
§ 4 para 3 No 5
§ 5 para 1 Nos 3
§ 20
§ 29 para 1 No 3
§ 98 para 2 No 4
§ 99 Nos 3, 4 and 5

participation capital
§ 23 para 1 No 5
§ 23 para 3 No 8
§ 23 paras 4 and 5
§ 23 para 13 Nos 3 and 4
§ 23 paras 15 and 16
§ 64 para 2
§ 73 para 1 No 8
§§ 102 and 102 a

participation certificates
§ 23 para 5
§ 102 paras 1 and 4

participation fund
§ 1 para 1 No 14

participation fund business
§ 1 para 1 No 14
§ 3 para 2 No 4

Participation Funds Act
§ 1 para 1 No 14
§ 69
§ 70 para 4

participation limits
§ 20 paras 5 and 6

participation right
§ 22 para 3 No 8
§ 23 para 5

partnerships of commercial law
§ 21 para 1 No 3
§ 23 para 3 No 1
§ 23 para 5
§ 92 para 1
§ 93 para 4

password
§ 31 para 3

pawnbroking
§ 3 para 3 No 5

pension funds
§ 3 para 3 No 2
§ 5 para 1 No 13
§ 93 para 4
§ 93 para 5 No 5

| | |
|---|---|
| Pension Funds Act | § 3 para 3 No 2 |
| permanent issue | § 64 para 1 No 5 lit a |
| permits | § 21 |
| personnel loan | § 1 para 1 No 18 |
| personnel loan broker | § 1 para 1 No 18 |
| position risks | |
| – debt instruments | § 22 g |
| – equities | § 22 i |
| – general | § 22 f<br>§ 22 h<br>§ 22 i |
| – netting | § 22 d |
| – particular instruments | § 22 e |
| – specific | § 22 f<br>§ 22 g<br>§ 22 i |
| – stock-index futures | § 22 j |
| precious metal | § 22 para 3 No 1 lit a<br>§ 25 para 6 No 3<br>§ 52 para 4 No 3 |
| precious metal contracts | Annex 2 to § 22, No 3 |
| precious metal forward contracts | Annex 2 to § 22, No 3 lit b |
| precious metal forward transactions | Annex 2 to § 22, No 3 lit a |
| precious metal options purchased | Annex 2 to § 22, No 3 lit c |
| prescription period | § 99 b |
| pretrial judicial investigation | § 5 para 1 No 7 |
| price display | § 35 |
| procedural provisions | §§ 96–101 |
| professional secrecy | § 75 para 5 No 4 |
| profit and loss account | § 23 para 6<br>§ 30 para 10<br>§ 43 para 2<br>§ 52<br>§ 56 para 2<br>§ 57 para 4<br>§ 58 para 3 |
| profit distribution | § 22 para 3 No 8<br>§ 23 para 1 No 2<br>§ 70 para 2 No 1 |
| profit participation right | § 23 para 6 |
| promissory note | § 25 para 4 No 5<br>§ 51 para 8<br>§ 75 para 1 Nos 1 and 2<br>§ 75 para 3<br>§ 93 para 5 No 10<br>Annex 1 to § 22, Nos 2 lit e and 4 lit a |
| prospectus | § 102 para 5 |
| protection of creditors | § 25 para 7 Nos 1 and 2<br>§ 77 para 2 |
| protection of depositors | § 10 para 4 No 2 |
| protection of designations | § 94 |

| | |
|---|---|
| | § 99 No 15 |
| | § 103 No 33 |
| provision of services business | § 52 para 3 |
| public | § 23 para 9 No 2 |
| | § 93 paras 8 and 8a |
| publication | § 25 para 10 No 9 lit d |
| | § 65 |
| punitive provisions | §§ 96–101 |

**Q**

| | |
|---|---|
| qualifying items | § 2 No 38 |
| quarterly report | § 74 paras 2, 3 and 5 |
| | § 106 No 15 |

**R**

| | |
|---|---|
| Raiffeisen | § 94 para 6 |
| | § 99 No 15 |
| real estate broker | § 1 para 1 No 18 |
| receivership | §§ 83–91 |
| | § 70 para 5 |
| | § 77 para 4 No 18 |
| | § 93 para 3 |
| | § 106 No 6 |
| receivership proceeding | § 70 para 5 |
| | § 82 para 2 |
| reciprocity | § 65 para 4 |
| redemption price | § 23 para 9 No 3 lit b |
| register of large exposures | § 30 para 10 No 8 |
| | § 75 para 5 No 1 |
| regulated market | § 2 No 37 |
| regulation | § 1 para 4 |
| | § 9 paras 7 and 8 |
| | § 11 paras 5 and 6 |
| | § 13 paras 4 and 5 |
| | § 15 para 1 |
| | § 17 para 1 |
| | § 22 para 3 Nos 6, 7 and 10 |
| | § 25 para 7 Nos 1 and 2 |
| | § 25 paras 12 and 14 |
| | § 27 para 10 Nos 1 and 2 |
| | § 41 para 8 |
| | § 43 para 2 |
| | § 68 para 2 |
| | § 72 para 3 |
| | § 73 para 1 No 9 |
| | § 74 paras 3 and 5 |
| | § 75 para 4 |
| | § 78 paras 1, 3 and 7 |
| | § 80 para 2 |
| | § 92 paras 6 and 8 |
| | § 105 para 3 |

| | |
|---|---|
| regulatory provisions | §§ 22–29 |
| religious communities | § 22 para 3 No 2 lit e<br>§ 103 No 10 lit d |
| renewal coupon | § 25 para 10 No 9 lit b |
| Reorganization Tax Act | § 92 paras 1 and 2 |
| replacement cost | § 22 para 6 Nos 1 and 3<br>§ 22 para 6f Nos 1 and 2 |
| replacing contracts | § 22 para 2 No 3<br>§ 22 para 6 |
| reporting duties | § 74<br>§ 75 para 2 |
| representation | § 2 No 17<br>§ 70 para 1 Nos 3 and 4<br>§ 71 paras 1 and 7<br>§ 73 para 2<br>§ 73 para 2 No 2<br>§ 99 No 11 |
| Republic of Austria | § 22 para 10<br>§ 26b para 5 |
| Research Promotion Act 1982 | § 3 para 1 No 8 |
| reserve | § 23 para 1 No 2<br>§ 24 para 2<br>§ 102a para 7<br>§ 103 No 12 |
| – free reserve | Annex 1 to § 43, part 1, Forms A, B, C, D, E, F and G |
| – capital reserve | § 51 para 11<br>Annex 1 to § 43, part 1, Forms B, C, D, E and F<br>Annex 2 to § 43, part 1 |
| – consolidated disclosed reserve | § 24 para 2 |
| – disclosed reserve | § 23 para 1 No 2 |
| – hidden reserve | § 23 para 1 No 4<br>§ 23 para 9 No 2 |
| – investment reserve | Annex 1 to § 43, part 1, Forms A, B, C, D, E and F<br>Annex 2 to § 43, part 1 |
| – liability reserve | § 23 para 1 No 2<br>§ 23 para 6<br>§ 93 para 3<br>§ 103 No 12 |
| – liquidity reserve | § 22 para 3 No 1 lit e |
| – profit reserve | § 51 para 12 |
| – reserve pursuant to articles of association | Annex 1 to § 43, part 1, Forms C, D and G<br>Annex 2 to § 43, part 1 |
| – revaluation reserves | § 23 para 1 No 7<br>§ 23 para 9 Nos 1 and 3<br>§ 23 para 14 No 4 |
| – special purpose reserve | Annex 1 to § 43, part 1, Forms E and G |
| – security reserve | Annex 1 to § 43, part 1, Forms E and G |

| | |
|---|---|
| – statutory reserve | Annex 1 to § 43, part 1, Forms B and G<br>Annex 2 to § 43, part 1 |
| – tax reserves | Annex 1 to § 43, part 1, Form G |
| – tax-free reserves | Annex 2 to § 43, part 1 |
| – tied-up reserve | Annex 1 to § 43, part 1, Forms A, C, D, E and F |
| reserve fund | § 23 para 3 No 7 |
| responsible person | § 98 paras 2, 3 and 4<br>§ 99 Nos 1, 2, 6, 6a, 8, 11, 12, 13, 14 and 16 |
| revenue certificate/dividend coupon | § 25 para 10 Nos 3 and 9 lit b |
| review schedule | § 42 para 5 |
| right of exchange | § 102 para 1 Nos 4 and 6<br>§ 102 para 2 |
| risk category | § 22 para 3 No 4 |
| risk coverage | § 23 para 12 |
| risk weighting | § 22 para 3 No 4<br>§ 22 para 6 No 1 |
| risks | § 23 para 12<br>§ 39 para 1<br>§ 57 paras 1 and 3 |

**S**

| | |
|---|---|
| safe custody services | § 1 para 2 No 6 |
| safe deposit boxes | § 1 para 3 |
| sale and repurchase transaction | § 22 para 4<br>§ 25 para 4 Nos 3 and 4<br>§ 50 paras 1, 4 and 6<br>§ 51 para 14 |
| – genuine sale and repurchase transaction | § 50 paras 2 and 4 |
| – non-genuine sale and repurchase transaction | § 50 paras 3 and 5<br>§ 51 para 14<br>Annex 1 to § 22, No 2 lit c |
| savings and cash advance association | § 94 para 9 |
| savings and loan association | § 94 para 9 |
| savings association | § 95 para 1 |
| savings bank | § 5 para 1 No 1<br>§ 23 para 3 No 4<br>§ 23 para 5<br>§ 31 para 2<br>§ 92 para 2<br>§ 92 para 5 No 1<br>§ 92 paras 8 and 9<br>§ 94 para 2<br>§ 99 No 15 |
| Savings Banks Act | § 69<br>§ 70 para 4<br>§ 94 para 2 |
| savings bank book | § 31 para 2<br>§ 99 No 7 |
| savings banks' council | § 92 para 5 No 1 |

| | |
|---|---|
| savings book | § 31 para 2 |
| | § 99 No 7 |
| savings certificate | § 31 para 2 |
| | § 99 No 7 |
| savings contract | § 52 para 3 No 4 |
| savings deposit | § 31 |
| | § 32 |
| | § 35 para 1 No 1 lit a and b |
| | § 68 para 2 Nos 1 and 2 |
| | § 93 para 1 |
| | § 98 para 3 No 1 |
| savings deposit business | § 1 para 1 No 1 |
| | § 3 para 2 |
| | § 31 para 2 |
| savings deposit held in trust for a ward | § 67 para 2 |
| | § 68 para 2 No 2 |
| savings document | § 31 |
| | § 32 |
| | § 37 |
| | § 98 para 3 Nos 1 and 2 |
| savings union | § 95 |
| scenario-matrix method | § 2 No 56 |
| | § 22e para 3 |
| sectoral organization | § 92 para 7 |
| securities | § 1 para 1 Nos 5, 7 lit e and 10 |
| | § 2 No 2 |
| | § 22 para 3 No 1 lit g and h |
| | § 22 para 3 No 2 lit g and l |
| | § 22 para 3 No 7 |
| | § 23 para 9 No 2 |
| | § 25 para 10 No 4 |
| | § 25 para 11 |
| | § 29 para 3 No 2 |
| | § 51 para 5 |
| | § 52 para 2 |
| | § 52 para 3 No 1 |
| | § 52 para 4 |
| | § 53 para 2 |
| | § 55 para 2 |
| | § 56 |
| | § 57 para 1 |
| | § 64 para 1 Nos 7, 9, 10 and 11 |
| | Annex 1 to § 22, No 1 lit c and i |
| | Annex 1 to § 22, No 2 lit e |
| | Annex 1 to § 22, No 4 lit a |
| securities accounts | § 40 para 1 No 1 lit a |
| securities business | § 1 para 1 No 7 lit e |
| securities exchange | § 27 para 5 No 2 |
| securities issuing business | § 1 para 1 Nos 9 and 10 |
| securities risk | § 30 para 10 No 10 |

| | |
|---|---|
| Securities Supervision Act | § 2 No 30 |
| | § 3 para 5 |
| | § 9 paras 7 and 8 |
| | § 38 para 2 No 9 |
| | § 63 para 4 No 2a |
| | § 63 para 6 No 2 |
| | § 63 para 6a |
| Security Police Act | § 41 para 1 |
| semi-official market | § 23 para 11 |
| | § 25 para 10 No 4 |
| service of documents | § 19 |
| Service of Documents Act | § 19 |
| setoff | § 23 para 8 No 4 |
| | § 54 para 2 |
| | § 86 para 6 |
| | § 93 para 4 |
| settlement risk | § 22l |
| shareholders | § 20 paras 5, 6 and 8 |
| | § 23 para 5 |
| | § 24 para 2 No 1 |
| | § 30 para 1 No 6 |
| | § 38 para 1 |
| | § 51 paras 10 and 11 |
| | § 98 para 2 No 4 |
| shares | § 1 para 1 No 15 |
| | § 23 para 13 Nos 3, 4 and 6 |
| | § 24 para 4 |
| | § 103 para 15 |
| social security institutions | § 3 para 3 No 4 |
| | § 22 para 3 No 2 |
| solvency | § 22 |
| | § 103 Nos 9–11 |
| solvency ratio | § 10 para 4 No 1 |
| | § 11 para 1 No 5 |
| | § 11 para 3 No 3 |
| | § 13 para 2 No 5 |
| | § 29 para 4 |
| special purpose savings enterprise | § 95 para 4 |
| speculation for differences | § 1 para 5 |
| spot rate | § 23 para 11 |
| | § 58 para 1 |
| state commissioner | § 76 |
| | § 92 para 10 |
| State mortgage bank | § 23 para 3 No 5 |
| | § 23 para 5 |
| | § 92 paras 2, 5, 8 and 9 |
| | § 94 para 7 |
| | § 99 No 15 |
| state of incorporation | § 11 para 1 |
| | § 13 para 1 |
| States (of the Austrian Federation) | § 22 para 3 No 1 lit b and d |
| | § 22 para 3 No 2 lit g sublit aa |

| | |
|---|---|
| | § 27 para 3 No 1 |
| | § 75 para 2 |
| Stock Corporation Act of 1965 | § 23 paras 5 and 16 |
| | § 39 para 1 |
| | § 92 para 4 |
| | § 102 para 1 |
| stock exchange | § 23 para 9 No 2 |
| | § 51 para 5 |
| | § 56 paras 4 and 5 |
| | § 64 para 1 Nos 10 and 11 |
| | § 102a paras 3 and 4 |
| Stock Exchange Act | § 2 No 3 |
| | § 3 para 1 No 5 |
| | § 20 para 5 |
| | § 98 para 2 No 4 |
| | § 102 para 5 |
| | § 103 No 9a |
| stock exchange day | § 23 para 11 |
| stock exchange quoted value | § 23 para 9 No 2 |
| | § 25 para 10 No 4 |
| stockholders | § 20 paras 5, 6 and 8 |
| | § 98 para 2 No 4 |
| subordination | § 23 para 8 Nos 2 and 3 |
| | § 64 para 1 No 5 lit c |
| subsidiary | § 2 No 12 |
| | § 4 para 5 Nos 1 and 2 |
| | § 8 para 1 Nos 1 and 2 |
| | § 8 para 5 Nos 1 and 2 |
| | § 11 para 1 |
| | § 11 para 2 No 1 |
| | § 13 |
| | § 59 para 2 |
| | § 99 No 4 |
| supervision | §§ 69–77a |
| supervision fee | § 76 para 9 |
| supervision on a consolidated basis | § 11 para 1 No 5 |
| | § 13 para 2 No 5 |
| supervisory board | § 2 No 1 lit b |
| | § 28 paras 1, 3 and 4 |
| | § 62 Nos 8 and 11 |
| | § 76 para 4 |
| | § 92 para 5 |
| | § 102 para 2 |
| supervisory organ | § 28 para 1 No 3 |
| | § 28 paras 3 and 5 |
| | § 63 paras 2 and 5 |
| supplementary capital | § 23 para 1 No 5 |
| | § 23 para 7 |
| | § 23 para 13 Nos 3 and 4 |
| | § 23 paras 15 and 16 |
| surcharge | § 22 para 2 No 3 |
| | § 23 paras 1, 10 and 14 |

| | |
|---|---|
| | § 26 b paras 2 and 5 |
| sureties | § 1 para 1 No 8 |
| | § 51 para 13 |
| | § 100 |
| | Annex 1 to § 22, No 1 lit c |
| syndicated loan | § 47 paras 1 and 2 |
| syndication business | § 3 para 2 No 1 |
| | **T** |
| tax charge | § 23 para 12 |
| territorial entity | § 22 para 3 No 2 lit c and d |
| | § 22 para 9 |
| | § 27 para 3 No 3 |
| third country | § 2 No 8 |
| | § 8 para 1 No 3 |
| | § 8 para 2 No 2 |
| | § 77 a para 1 No 2 |
| | § 93 paras 4 and 8 |
| | § 103 No 2 |
| third party issuing of securities business | § 1 para 1 No 11 |
| third country relationship | § 8 |
| total book value | § 29 para 2 |
| total burden | § 33 para 2 No 1 lit a |
| | § 33 para 2 No 5 |
| | § 33 paras 4, 5, 7 and 8 |
| Trade Act | § 5 para 1 No 6 |
| trade association | § 61 para 1 |
| | § 63 para 8 |
| | § 92 para 3 No 2 |
| | § 92 para 7 |
| | § 93 paras 1, 2 a, 3 and 7 |
| | § 93 a para 1 |
| trading book | |
| – consolidation | § 22 c |
| – definition | § 2 No 35 |
| – own funds requirement | § 22 b |
| – repurchase agreement | § 2 No 44 |
| – reverse repurchase agreement | § 2 No 46 |
| – securities borrowing | § 2 No 47 |
| – securities lending | § 2 No 45 |
| – valuation of positions | § 22 a |
| trading on the stock exchange | § 51 para 5 |
| | § 64 para 1 No 10 |
| trading portfolio | § 2 No 35 |
| | § 53 para 2 |
| | § 55 para 2 |
| | § 57 para 1 |
| trading with coins and metals | § 1 para 3 |
| transaction in foreign currency | § 52 para 3 No 3 |
| transactions with affiliated parties | § 28 |

| | |
|---|---|
| transferring credit institution | § 92 para 3 No 2<br>§ 92 paras 6, 8, 9 and 10 |
| transferring savings bank | § 92 para 5 No 1 |
| transitional provisions | §§ 103–108 |
| treasury bill assignment | § 51 para 2 |
| trust business | § 3 para 2 No 1 |
| | **U** |
| undertakings for collective investments | § 93 para 5 No 5 |
| underwritings | § 22k |
| union | § 21 para 1 No 1 |
| United Nations | § 78 para 7 |
| | **V** |
| valuation | § 22 paras 5, 6 and 10<br>§ 24 para 2 No 4<br>§§ 55–58<br>§ 63 para 4 No 1 |
| valuation date | § 32 para 7<br>§ 37 |
| value adjustments | § 22 para 2<br>§ 52 para 4 No 1<br>§ 53 paras 1 and 2<br>§ 54 para 1<br>§ 63 para 4 No 1 |
| value at risk | § 26b |
| vega risk | § 2 No 55<br>§ 22e para 4 |
| Vienna Stock Exchange | § 23 para 11 |
| voting right | § 2 Nos 2 and 3<br>§ 11 para 1 No 3<br>§ 13 para 2<br>§ 20 paras 2, 6, 7 and 7a<br>§ 21 para 1<br>§ 28 para 1<br>§ 30 para 1 Nos 2, 6 and 7<br>§ 99 No 4<br>§ 99a paras 1 and 2 |
| | **W** |
| warrant | § 2 No 42 |
| – covered warrant | § 2 No 43 |
| weightings | § 22 |
| written form requirement | § 4 para 2<br>§ 7 para 3<br>§ 9 para 5<br>§ 10 para 5<br>§ 16 para 2<br>§ 20 paras 1 and 5 |

| | |
|---|---|
| | § 25 para 13 |
| | § 33 paras 2 and 6 |
| | § 98 para 2 Nos 1–4 and 7 |
| | **Z** |
| Zone A | § 2 Nos 18, 19 and 20 lit c |
| | § 22 para 10 No 2 |
| Zone A central banks | § 22 para 3 No 1 lit b, d and g |
| Zone A central governments | § 22 para 3 No 1 lit b, d and g |
| Zone A regional governments | § 22 para 3 No 7 |
| Zone A credit institutions | § 2 No 20 |
| | § 22 para 3 No 2 lit g sublit ee and ff |
| | § 22 para 3 No 2 lit h and j |
| Zone B | § 2 No 19 |
| Zone B central banks | § 22 para 3 No 1 lit e and f |
| Zone B central governments | § 22 para 3 No 1 lit e and f |
| Zone B credit institutions | § 2 No 21 |
| | § 22 para 3 No 2 lit i and k |